

Supreme Court, U. S.

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In the Supreme Court

OF THE

United States

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OCTOBER TERM, 1979

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No. 79-97

CALIFORNIA RETAIL LIQUOR DEALERS ASSOCIATION,  
a California corporation,  
*Petitioner*

VS.

MIDCAL ALUMINUM, INC., a California corporation,  
*Respondent*

BAXTER RICE as Director of the Department of  
Alcoholic Beverage Control of the State of California  
*Respondent*

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**PETITION FOR WRIT OF CERTIORARI**  
to the Court of Appeal of the State of California  
in and for the Third Appellate District

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## SUBJECT INDEX

	<u>Page</u>
Opinions below .....	2
Jurisdiction .....	2
Questions presented .....	2
Statutory provisions involved .....	3
Statement of the case .....	5
Reasons for granting the writ .....	11

### I

The State court decision is contrary to decisions of this Court defining the scope of the State's authority to regulate alcoholic beverages within a State's borders under the twenty-first amendment .....	11
---	----

### II

The State court decision in declaring invalid State regulatory statutes that require the setting of minimum prices for the sale of wine is not in accord with decisions of this Court defining the "state action" exemption to the Sherman Antitrust Act .....	22
--	----

### III

The State court decisions have created confusion and uncertainty as to the validity of any state alcoholic beverage statute where it can be argued that compliance with the statute constitutes a "restraint of trade" .....	31
(A) The California situation .....	31
(B) Effect on New York and other states .....	33
(C) Threat of civil and criminal prosecution under the Sherman Antitrust Act .....	35
Conclusion .....	37



## TABLE OF AUTHORITIES CITED

## Cases

	Page
Federal:	
Bates v. State Bar of Arizona (1976) 433 U.S. 350	25, 26, 30
California v. LaRue (1972) 409 U.S. 109	14
Cantor v. Detroit Edison Co. (1975) 428 U.S. 579	25, 26, 28, 29, 30
Clark Distilling Co. v. Western Maryland Railway Company, 242 U.S. 311	20
Craig v. Boren (1976) 429 U.S. 190	15
Goldfarb v. Virginia State Bar (1974) 421 U.S. 773	25, 26, 28, 29
Hicks v. Miranda (1975) 422 U.S. 332	19
Hostetter v. Idlewild Liquor Corp. (1964) 377 U.S. 324	15, 16, 20
Lafayette v. Louisiana Power & Light Co. (1977) 435 U.S. 389	25, 26, 29, 30, 31
McCormick & Co. v. Brown, 286 U.S. 131	20
National Railroad Passenger Corporation v. Harris, [10th Cir., 1974] 490 F.2d 572	18
National Railroad Passenger Corporation v. Miller, 358 F. Supp. 1321 (D.C.Kan., 1973), affirmed, 414 U.S. 948, 94 S.Ct. 285, 38 L.Ed.2d 205 (1973)	17, 18, 20, 21
Parker v. Brown (1942) 317 U.S. 341	25, 26, 27, 28
Seagram & Sons v. Hostetter (1966) 384 U.S. 35	14, 16, 20, 33, 34
Wisconsin v. Constantineau (1971) 400 U.S. 433	15
State:	
Allied Properties v. Department of Alcoholic Beverage Control (1959) 53 Cal.2d 141	5
Big Boy Liquors, Ltd. v. Alcoholic Bev. etc. Appeals Bd. (1969) 71 Cal.2d 1226	5, 12
Capiscean Corporation v. Alcoholic Bev. etc. Appeals Bd., 87 Cal.App.3d 996	7, 8, 9, 31
Farmers Markets, Inc. v. Baxter Rice, 3 Civil 18743	8, 32
In the Matter of William J. Mezzetti Associates, Inc. v. State Liquor Authority (1978) 410 N.Y.S.2d 893	34, 35
Rice v. Alcoholic Bev. etc. Appeals Board (1978) 21 Cal.3d 431	passim
Sail'er Inn, Inc. v. Kirby (1971) 5 Cal.3d 1	15
Samson Market Co. v. Alcoholic Bev. etc. Appeals Bd. (1969) 71 Cal.2d 1215	5
Wilke & Holzheiser Inc. v. Department of Alcoholic Beverage Control (1966) 65 Cal.2d 349	5

## TABLE OF AUTHORITIES

## Constitutions

	Page
California Constitution:	
Article III, Section 3.5	7
Article XX, Section 22	24
United States Constitution:	
First Amendment	14
Fourteenth Amendment	14, 15, 16
Twenty-first Amendment	3, 5, 11, 12, 14, 17, 18, 20, 21, 22, 33, 36

## Rules

Title 4, California Administrative Code:	
Rule 90	24
Rule 99	24
Rule 99.2	24
Rule 100	24
Rule 101	24
Rule 105	24

## Statutes

Alcoholic Beverage Control Act:	
(California Business & Professions Code)	
Section 23000 et seq.	passim
Sections 23000-25762	23
Section 23001	24
Section 24682	4
Section 24749	23
Section 24755	23
Section 24756	8
Section 24862	24
Section 24866	4, 24
Section 25000	7, 8, 32
Section 25000.5	7, 32
Kansas Statutes, Section 41-1113	27
Section 41-1114	27
New York Liquor Control Act, Section 101-bb	27
Sherman Antitrust Act (15 U.S.C. section 1)	passim
28 U.S.C. Section 1257(3)	2
Webb-Kenyon Act (27 U.S.C. § 122)	11, 20, 21

## Other Authorities

1975 U.S. Code, Cong. & Admin. News, pp. 1569, 1571	20
C. Wright, Law of Federal Courts, 495 (2d Ed. 1970)	19

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**PETITION FOR WRIT OF CERTIORARI  
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The Petitioner, CALIFORNIA RETAIL LIQUOR DEALERS ASSOCIATION, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California in and for the Third Appellate District entered in this proceeding on March 26, 1979.

## OPINIONS BELOW

The Court of Appeal's denial of Petition for Rehearing was entered on April 19, 1979. The opinion of the Court of Appeal, entered March 26, 1979, is reported at 90 Cal.App.3d 979 (1979) (Appendix A). The California Supreme Court's denial of Petition for Hearing was entered on May 24, 1979 (Appendix B).

## JURISDICTION

The opinion of the Court of Appeal of California, Third Appellate District, was entered on March 26, 1979. The Court of Appeal denied a timely petition for rehearing on April 19, 1979. On May 24, 1979, the Supreme Court of California denied a timely petition for hearing.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257(3).

## QUESTIONS PRESENTED

### I

Are California statutes, enforced by the California Department of Alcoholic Beverage Control, that require the brand owners or sellers of wine to retailers within the State of California to establish minimum *consumer* prices and file such prices with the state regulatory agency as part of a comprehensive regulatory scheme clearly articulated and affirmatively expressed in the Alcoholic Beverage Control Act governing the use, sale, possession and distribution of alcoholic beverages within the state, and which also require the retailers to sell to consumers at prices no lower than those thus established, invalid under the Sherman Antitrust Act?

### II

Are California statutes, enforced by the California Department of Alcoholic Beverage Control, that require the brand owners or sellers of wine to retailers to establish prices for the sale of wine to *retailers* within the State of California, file such prices with the state regulatory agency and require that wine be sold to retailers at the prices filed, all of which requirements are a part of a comprehensive regulatory scheme clearly articulated and affirmatively expressed in the Alcoholic Beverage Control Act governing the use, sale, possession and distribution of alcoholic beverages within the state, invalid under the Sherman Antitrust Act?

### III

Does the "state action" exemption place the requirements of the California Alcoholic Beverage Control Act relating to "fair trade" prices on sales of wine to consumers and the "price-posting" of wine prices from wholesalers to retailers outside the reach of the Sherman Antitrust Act?

### IV

Does the Twenty-first Amendment confer upon a state the right to enact and enforce statutory provisions regulating the prices at which wine shall be sold at both wholesale and retail within the state unfettered by the Commerce Clause or the Sherman Antitrust Act?

## STATUTORY PROVISIONS INVOLVED

California Business and Professions Code, Division 9, (Alcoholic Beverage Control Act), Chapter II (Wine Fair Trade Contracts and Price Posting):

§ 24682. Compliance with price schedules and fair trade contracts.

No licensee shall in this state sell or resell to a retailer, and no retailer shall in this state buy any item of wine except at the selling or resale price thereof contained either in an effective price schedule or in an effective fair trade contract as authorized by Chapter 10 of this division [commencing with Section 24749], unless otherwise provided in this chapter.

No licensee in this state shall sell or resell to a consumer any item of wine at less than the selling or resale price thereof contained either in an effective price schedule or in an effective fair trade contract as authorized by Chapter 10 (commencing with Section 24749) of this division unless otherwise provided in this chapter.

Wine sold pursuant to a bona fide order accepted on the last business day of any month may be delivered to the purchaser, at the price in effect during said month, within two business days immediately following the last day of the month in which the sale was made.

§ 24866. Price schedules and fair trade contracts: Growers, wholesalers, and rectifiers.

Each wine grower, wholesaler licensed to sell wine, wine rectifier, and rectifier shall:

(a) Post a schedule of selling prices of wine to retailers or consumers for which his resale price is not governed by a fair trade contract made by the person who owns or controls the brand.

(b) Make and file a fair trade contract and file a schedule of resale prices, if he owns or controls a brand of wine resold to retailers or consumers.

## STATEMENT OF THE CASE

California, like the other states in the Union, has enacted various statutes under the 21st Amendment to the United States Constitution relating to the sale, use, possession, distribution, importation, taxing, etc., of alcoholic beverages. In California these provisions are in the Alcoholic Beverage Control Act (Act). (Business & Professions Code, section 23000 et seq.)

In addition to restrictions on the issuance and number of licenses, "tied house" restrictions, restrictions on advertising, exclusive territory provisions, the designation of trading areas, and many other regulations and restrictions governing alcoholic beverages, the California Act also contains provisions for resale price maintenance for distilled spirits and beer at the consumer level. Wine is required to be sold to consumers at minimum prices contained in a "fair trade contract" or an "effective price schedule." The failure to establish minimum retail prices, as required by state law, or the sale by a retailer at a price below the prices thus established is a violation of the Act and results in disciplinary action by the Department of Alcoholic Beverage Control (Department) which may result in revocation of the license involved.

In 1978, the California Supreme Court, in *Rice v. Alcoholic Bev. etc. Appeals Board*, 21 Cal.3d 431, (*Rice*), in a 7-0 decision, after having upheld the validity of the minimum consumer price provisions of the Act on at least four previous occasions,<sup>1</sup> reversed its position and declared

<sup>1</sup>*Allied Properties v. Department of Alcoholic Beverage Control* (1959) 53 Cal.2d 141; *Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control* (1966) 65 Cal.2d 349; *Samson Market Co. v. Alcoholic Bev. etc. Appeals Bd.* (1969) 71 Cal.2d 1215; and *Big Boy Liquors, Ltd. v. Alcoholic Bev. etc. Appeals Bd.* (1969) 71 Cal.2d 1226.



the price maintenance statute covering distilled spirits invalid as violating the Sherman Antitrust Act (15 USC, section 1.) (Appendix C.)

In *Rice*, a retailer sold distilled spirits to a consumer at prices less than the minimum prices established and filed with the Department. The California Supreme Court based its declaration of invalidity solely on federal grounds. It held that if the conduct would otherwise be violative of the Sherman Antitrust Act, a Court must "balance" the interests involved in enforcing the Sherman Antitrust Act against the interests of the state in enacting and enforcing a statute regulating the sale of alcoholic beverages within the state. The California Supreme Court further held that even though the conduct of the manufacturers in setting the minimum prices was required by California statutes and regulations and enforced by state officials, the statute did not qualify for the "state action" exemption from the Sherman Antitrust Act.

A petition for rehearing before the California Supreme Court in the *Rice* case was filed by the Director of the Department of Alcoholic Beverage Control (Director) which was subsequently denied. The Director did not seek a writ of certiorari from the United States Supreme Court. Since the Director was the only "losing" party, the federal questions on which the decision was based were not brought before the United States Supreme Court.

The same statute that requires the establishment of minimum prices for distilled spirits also relates to beer, and the Director ceased enforcement of minimum retail prices

to the consumer in the case of both distilled spirits and beer. The wine statutes relating to consumer prices, unlike those covering beer and distilled spirits, provide for fair trade contracts.

After the *Rice* case, the Alcoholic Beverage Control Appeals Board (Appeals Board), an administrative agency which reviews decisions of the Department, affirmed disciplinary action against a licensee charged with selling wine at prices below the minimum consumer prices. The Appeals Board noted, however, that it felt the wine consumer price statutes to be invalid just as it had earlier ruled the distilled spirits statute to be invalid in the *Rice* case.<sup>2</sup> (The California State Constitution now prohibits an administrative agency from declaring a statute unenforceable on the basis that federal law prohibits its enforcement until a California Appellate Court has so ruled. Article III, Section 3.5 of California Constitution, approved June 6, 1978.)

This Appeals Board decision was reviewed by a California Court of Appeal. That Court held the consumer minimum wine prices were likewise invalid and "for the reasons stated in *Rice*, must also fall." (*Capiscean Corporation v. Alcoholic Bev. etc. Appeals Bd.*, 87 Cal.App.3d 996.) (Appendix D.)

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<sup>2</sup>The Appeals Board, on May 31, 1979, in affirming a decision of the Department imposing discipline on another licensee, commented that it felt the wholesale to retail price posting requirements for beer (Bus. & Prof. Code § 25000) and the provision requiring written agreements between beer manufacturers and beer distributors designating territorial limits for the distributors (Bus. & Prof. Code § 25000.5) were likewise invalid under the Sherman Antitrust Act. (Appendix E.)

The Director did not petition for a rehearing before the Court of Appeal in the *Capiscean* case nor did he petition for a hearing before the California Supreme Court. Neither did the Director seek a writ of certiorari from the United States Supreme Court and, as in *Rice*, there was no other party who could seek review from the United States Supreme Court of the purely federal questions involved in the Court of Appeal's decision in *Capiscean*.

The instant case arises since California, like some 14 other states in this Union, in its Alcoholic Beverage Control Act requires that the prices at which *wholesalers* sell to *retailers* be established by the brand owner or wholesaler and filed with the Department. (Appendix F.) No alcoholic beverage, including wine, may be sold to a retailer unless a price schedule, and for wine, a fair trade contract, is filed with the Department. Additionally, the wholesaler must sell to the retailer at the prices thus established. Violation of any of these provisions can result in suspension or revocation of the offender's license by the Department.

The wholesale to retail and retail to consumer price provisions for wine are lumped together in two statutes as shown under the heading "Statutory Provisions Involved" in this Petition. This is different than the situation with beer (Bus. & Prof. Code, § 25000) and distilled spirits (Bus. & Prof. Code, § 24756) where separate, specific statutes cover only the *wholesale to retail* price posting.<sup>3</sup>

<sup>3</sup>In yet another challenge to the Act, an original proceeding was commenced on July 3, 1979 in the same California Court of Appeal that decided the instant case. It is alleged in *Farmers Markets, Inc. v. Baxter Rice*, 3 Civil 18743, that sections 24756 and 25000 are likewise invalid under the Sherman Antitrust Act and enforcement should be restrained. The contention is based on the *Rice* and the instant decisions.

Both the *Rice* and *Capiscean* cases involved disciplinary actions against licensees by the Department at the administrative level, appeals to the Appeals Board and review by the Court of Appeal. Until the Appeals Board issued its opinion reversing the Department's decision in the *Rice* case, there was no need for participation or intervention in the case by any segment of the alcoholic beverage industry. Since under California law, intervention is not generally permitted on appeal, there were no intervenors in the *Rice* case or the *Capiscean* case. This situation left the Department as the only party seeking to uphold the law. In the present case, since the proceeding in the Court of Appeal was an original writ proceeding, in effect seeking declaratory relief, intervention was proper and allowed, therefore providing the first opportunity for Petitioner herein to become a party to a case involving the basic federal question of the validity of the statutory scheme for regulating alcoholic beverages in California under the Sherman Antitrust Act as it relates to minimum consumer prices at retail and the prices from wholesale to retail for wine.

Petitioner, CALIFORNIA RETAIL LIQUOR DEALERS ASSOCIATION (CRLDA) is a trade association comprised of over 3,000 of the independent retail liquor establishments in California. Respondent, MIDCAL ALUMINUM, INC. (MIDCAL) is a wholesale distributor of Gallo wine in Southern California. Respondent, BAXTER RICE, is the director of the Department of Alcoholic Beverage Control of the State of California.

MIDCAL sold wine to a retailer at prices less than that posted with the Department, and sold other wine to a re-

tailer for which no prices had been posted with the Department. The Department filed an accusation against MIDCAL charging these violations. MIDCAL stipulated to the truth of the factual allegations, and agreed that "The Department may, subject to a judicial determination of the constitutionality of Section 24850 et seq., Business and Professions Code and Rule 101 of the Chapter 1, Title 4, California Administrative Code, impose a monetary penalty or suspension of [petitioner's] licenses as provided in Section 24880 of the Business and Professions Code."

Thereafter, respondent MIDCAL filed an original proceeding seeking a writ of mandamus in the State Court of Appeal restraining Director from enforcing the provisions of the Act relating to wholesale and retail prices of wine.

After briefs were filed and oral argument presented the Court of Appeal, stating that "We are bound by the decisions of the California Supreme Court," [referring to *Rice*], directed the issuance of a peremptory writ of mandate ordering the Director to "refrain from enforcing the fair trade and wine price posting provisions of the Alcoholic Beverage Control Act."

The petitioner, CRLDA, [Intervenor below] petitioned the Court of Appeal for a rehearing which was denied. Petitioner thereafter filed a petition for hearing with the California Supreme Court. That petition was denied, without comment, on May 24, 1979.

Petitioner then applied for and was granted a stay of issuance of the peremptory writ of mandate from the Court of Appeal for the purpose of seeking the issuance of a writ of certiorari from the United States Supreme Court. (Ap-

pendix G.) That stay was extended by the Court of Appeal on June 27, 1979 to July 20, 1979. (Appendix H.)

## REASONS FOR GRANTING THE WRIT

### I

#### THE STATE COURT DECISION IS CONTRARY TO DECISIONS OF THIS COURT DEFINING THE SCOPE OF THE STATE'S AUTHORITY TO REGULATE ALCOHOLIC BEVERAGES WITHIN A STATE'S BORDERS UNDER THE TWENTY-FIRST AMENDMENT.

The position taken by the California Court of Appeal in this case and the basis for its decision is best described by the following quotation from that decision, found at page 984, footnote 4 (Appendix A page A-7):

"... The California Supreme Court carefully considered whether the California liquor price maintenance scheme was within the state action exception or saved by the Twenty-first Amendment, and concluded that neither exception applied. (*Rice*, supra, 21 Cal.3d at pp. 441-444, 447-457.) We are bound by that decision."

The resultant decision is contrary to both the Webb-Kenyon Act (27 USC § 122) and cases decided by this Court involving the application of the Twenty-first Amendment to state regulation in the field of alcoholic beverages. The Court of Appeal confined its decision to a reliance on the California Supreme Court decision in *Rice* and thus adopted the Supreme Court's exclusive reliance on its interpretation of the applicable federal law.

This misinterpretation and misapplication of the rule enunciated by the various United States Supreme Court



cases not only has created great chaos and uncertainty in the California alcoholic beverages regulation, but will have such an effect in the various other states in the Union that have similar laws as discussed elsewhere in this petition.

The California Supreme Court prior to the *Rice* case had on four occasions upheld the validity of the price maintenance provisions of the Act. (See Statement of the Case.)<sup>4</sup> Except for its attempt to reconcile the decisions in those earlier cases with its decision in the *Rice* case, the California Supreme Court based its decision exclusively on its interpretation of the applicability of the Sherman Antitrust Act and its discussion was confined to the effect of the Twenty-first Amendment on the power of the state to regulate alcoholic beverages and the "state action" exception to the Sherman Antitrust Act.

Having based its decision exclusively on its interpretation of federal law, in connection with its discussion of the Twenty-first Amendment's effect on the California regulatory scheme, the California Court adopted, for alcoholic beverage regulation, what may be the traditional approach for giving effect to the Commerce Clause in the typical state economic regulation situation, but one which has never been applied to alcoholic beverage cases. The Court adopted what it considered to be a "balancing" test. This test, as misapplied by the California Supreme Court to the situation in the *Rice* case, is perhaps best exemplified on

<sup>4</sup>Including the case of *Big Boy Liquors, Ltd. v. Alcoholic Bev. etc. Appeals Bd.* (1969), *supra*, in which it was contended that the California retail price maintenance scheme was contrary to the Sherman Antitrust Act and in which Justice Mosk (who also wrote the decision in *Rice*) wrote the decision and upheld the validity of the alcoholic beverage statute involved.

page 448, wherein the California Supreme Court announces its new rule for alcoholic beverages as follows:

"... When a statute enacted pursuant to the Twenty-first Amendment conflicts with an enactment based on the Commerce Clause, we must balance the policies furthered by each in order to determine which should prevail."

And again, on page 453:

"... Rather, as *Hostetter* and *Sail'er Inn* command, we must balance California's interest in promoting temperance and orderly marketing conditions by the methods set forth in section 24755 against the policy underlying the Sherman Act."

That "balancing" is precisely what the California Supreme Court did is demonstrated by the following quotation from page 451 of its *Rice* decision:

"Therefore, we must undertake a balancing process in the present case. We must ascertain what policies are furthered by the state system of permitting producers to fix retail prices, whether the retail price maintenance provisions clearly vindicate those policies, and whether and to what degree the policy underlying the Sherman Act is undermined by the state's program."

That this "new" approach by the California Supreme Court is contrary to the law as laid down by the United States Supreme Court in a number of cases is not open to serious question. Nor is there any question that the Court of Appeal in the instant case adopted that "new" approach as the rationale for its decision in stating that it was "bound by that decision."



In *California v. LaRue*, 409 U.S. 109, decided in 1972, this Court reversed a three judge court which had held that regulations of the Department of Alcoholic Beverage Control were in conflict with the First and Fourteenth Amendments. The following quotation, at page 114 of the *LaRue* decision, demonstrates the inconsistency and incorrectness of the California Supreme Court's decision in *Rice* when compared with the law as laid down by this Court:

"While the states, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power, the broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare and morals. In *Hostetter v. Idlewild Liquor Corp.*, 377 U.S. 324, 330 (1964), the Court reaffirmed that by reason of the Twenty-first Amendment 'a state is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders.'"

This Court, in *Seagram & Sons v. Hostetter*, 384 U.S. 35, 41 (1966) emphasized the position of the Twenty-first Amendment in the scheme of the regulation of alcoholic beverages as follows:

"Consideration of any state law regulating intoxicating beverages must begin with the Twenty-first Amendment, the second section of which provides that: 'The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.'"

As support for its "balancing" approach, the California Supreme Court relies on two cases; *Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1 and *Hostetter v. Idlewild Liquor Corp.* (1964) 377 U.S. 324. Neither case supports the proposition for which it was urged by the California Supreme Court.

In *Sail'er Inn*, the sole question was whether or not the California statute prohibiting the employment of female bartenders was valid under the Fourteenth Amendment to the United States Constitution. The California Supreme Court ruled the statute was invalid. The United States Supreme Court has consistently taken an approach similar to that taken by the California Supreme Court in the *Sail'er Inn* case, in situations involving fundamental rights such as the Fourteenth Amendment and due process clause, even though the statutes interfering with fundamental constitutional rights were contained in regulations relating to alcoholic beverages. This is illustrated by the case of *Craig v. Boren* (1976) 429 U.S. 190, where an Oklahoma statute specified different drinking ages for men and women. This Court correctly ruled that the statute was unconstitutional under the equal protection clause. Likewise, in *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), the fundamental notice and hearing requirement of the due process clause of the Fourteenth Amendment was held applicable in striking down a Wisconsin statute providing for the public posting of names of persons who had engaged in "excessive" drinking without giving notice and an opportunity to be heard to the persons so identified. The regulation and enforcement of the prices at which alcoholic beverages are required to be sold to either the consuming

public or to retailers simply do not fall in the same category as those situations involving the equal protection clause or the due process clauses of the Fourteenth Amendment.

In *Hostetter*, the Court was concerned with a state regulation which applied to liquor destined for consumption in a foreign country. *Hostetter* involved interstate and foreign commerce which the Court held was a different situation than liquor sales that involved activity within the state's border. This distinction between intra-state and foreign commerce by the United States Supreme Court was made clear in the *Seagram & Sons* case which was decided two years after *Hostetter*. That the *Idlewild* case should not be interpreted to restrict the state's broad regulatory power over liquor traffic within its borders is well illustrated at page 42 of *Seagram & Sons* where this Court stated:

"Unlike *Idlewild*, the present case concerns liquor destined for use, distribution, or consumption in the State of New York. In that situation, the Twenty-first Amendment demands wide latitude for regulation by the state."

The situation in *Seagram & Sons* was very similar to that in the instant case in that it involved the price affirmation statutes of New York which additionally require the posting of the prices from wholesale to retail just as the California sections involved in this instant petition do.

The following quotation from *Seagram & Sons* is particularly appropriate in the instant matter in view of the wholesale to retail price posting provisions of the California Act which were declared invalid in the instant case:

"The bare compilation, without more, of price information on sales to wholesalers and retailers to support the affirmations filed with the State Liquor Authority would not of itself violate the Sherman Act." (At page 45.)

The California Supreme Court, in its decision in *Rice*, recognizes that there is contrary federal authority to the position it is taking in the *Rice* case on the effect of the Twenty-first Amendment on alcoholic beverage regulation within a state. At page 450 of its opinion, in footnote 11, the California Supreme Court concedes that the Department's argument supporting the retail price maintenance provisions, based upon the traditional approach to cases arising under the Twenty-first Amendment is contrary to the position the Court is taking that the interests of the Sherman Antitrust Act and a statute enacted pursuant to the Twenty-first Amendment should be "balanced" one against the other. The California Supreme Court states in that footnote:

"The Department's views as to the reach of the Twenty-first Amendment are supported by *National Railroad Passenger Corp. v. Miller* (D.Kan. 1973) 358 F.Supp. 1321, and by dictum in *Washington Brewers Institute v. United States* (9th Cir. 1943) 137 F.2d 964, decided a number of years before *Hostetter* . . ."

What the California Supreme Court did not mention, however, was the fact that the *National Railroad Passenger Corp.* case was summarily affirmed by the United States Supreme Court in 1973 in 414 U.S. 948. In *National Railroad Passenger Corp. v. Miller*, supra, the Court held

that Kansas statutes regulating the sale and distribution of liquor, passed under authority of the Twenty-first Amendment, could not be invalidated by Acts of Congress passed under authority of the Commerce Clause. A later federal case coming out of the 10th Circuit in 1974, recognized the effect of the summary affirmance by this Court of the earlier *National Railroad Passenger Corp.* case and reached the same result on the same basic facts. Amtrak was serving alcoholic beverages by the drink, contrary to Oklahoma law, on its passenger train passing through Oklahoma. This was the same situation as in Kansas in the earlier case. In disposing of the claimed exemption from the Oklahoma statute, the 10th Circuit Court ruled:

“... Amtrak’s first issue based on its claimed exemption from Oklahoma law was raised and decided adversely to it in *National Railroad Passenger Corporation v. Miller*, 358 F.Supp. 1321 (D.C.Kan., 1973), affirmed, 414 U.S. 948, 94 S.Ct. 285, 38 L.Ed.2d 205 (1973). It is therefore without merit.” (*National Railroad Passenger Corporation v. Harris*, [10th Cir., 1974] 490 F.2d 572.)

The California Supreme Court has chosen to disregard the summary affirmance by the United States Supreme Court of the earlier *National Railroad Passenger Corp.* case. That case reaffirms this Court’s position and is the most recent case of which petitioner is aware where this Court has, in effect, considered the Twenty-first Amendment issue involved in the instant case. Thus, the California Supreme Court’s *Rice* decision and its adoption in the instant case presents a direct conflict with the decisions of the United States Supreme Court.

The effect to be given to a summary affirmance by the Supreme Court of the United States is well known and set forth clearly and concisely in the case of *Hicks v. Miranda* (1975) 422 U.S. 332, at page 344:

“... votes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case . . .”

To further emphasize the significance of a summary affirmance, this Court, in *Hicks*, at page 344, cites the following quotation from C. Wright, *Law of Federal Courts*, 495 (2d Ed. 1970):

“(‘Summary disposition of an appeal, however, either by affirmance or by dismissal for want of a substantial federal question, is a disposition on the merits.’).”

And finally, as if to make the point abundantly clear to all, the Court states, at page 344:

“That the lower courts are bound by summary decisions by this court ‘until such time as the court informs [them] that [they] are not.’”

The California Supreme Court in similar disregard of the report of the Senate Judiciary Committee, which recommended repeal of the Miller-Tydings Act (fair trade contracts) and the McGuire Act (non-signer provisions), stated that the “report represents only an opinion that the Twenty-first Amendment will allow continuation of price fixing for liquor in those states that properly allow such conduct . . .”.

Petitioner agrees with the Senate Judiciary Committee report’s conclusion that neither the repeal of Miller-Tydings or McGuire is relevant to the question of the effect



of the Twenty-first Amendment on the power of a state to enact legislation relating to price maintenance.<sup>5</sup>

Probably the most significant statement in the first *National Railroad Passenger Corp.* case (*Miller*) in the present context is the following:

"Under the Twenty-First Amendment, a state has the right to legislate concerning intoxicants brought from without the state for use and sale therein, unfettered by the Commerce Clause. *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 60 S.Ct. 163, 84 L.Ed. 128. A state is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants designed for use, distribution or consumption within its borders." (Citing both *Seagram & Sons* and *Hostetter*.) (At pg. 1327.)

The Court, in the earlier *National Railroad Passenger Corp.* case (*Miller*) points out, at page 1326, that the Webb-Kenyon Act, 27 U.S.C. § 122, first enacted in 1913, "took away the protection of interstate commerce from all receipt and possession of liquor prohibited by state law." In that connection, the Court cites *Clark Distilling Co. v. Western Maryland Railway Company*, 242 U.S. 311 at page 325. The Court further referred to the case of *McCormick & Co. v. Brown*, 286 U.S. 131 and stated:

<sup>5</sup>The Senate Judiciary Report states: "Liquor will not be affected by repeal of the fair trade laws in the same manner as other products because the Twenty-First Amendment to the Constitution gives the States broad powers over the sale of alcoholic beverages. Thus while repeal of the fair trade laws generally will prohibit manufacturers from enforcing resale prices, alcohol manufacturers may do such in States which pass price fixing statutes pursuant to the Twenty-First Amendment." (1975 U.S. Code, Cong. & Admin. News, at pp. 1569, 1571.)

"... the Court succinctly observed that there is no reason for denying to the Webb-Kenyon Act its intended application to prevent the immunity of transactions in interstate commerce from being used to impede the enforcement of the state's valid prohibitions."

Significantly, the Webb-Kenyon Act was not mentioned in the *Rice* case by the California Supreme Court. A consideration of the effect of Commerce Clause legislation by Congress on Twenty-first Amendment legislation by a state would seem incomplete without considering the Webb-Kenyon Act.

The *National Railroad Passenger Corp. v. Miller* opinion is well-considered, is a correct analysis of the current and past state of the law and adequately disposes of the central issue in this case, namely, the effect of the Twenty-first Amendment vis a vis the Commerce Clause in the field of alcoholic beverage regulation within the borders of a state. It properly interprets the leading cases and because of the effect of a summary affirmance by the United States Supreme Court should be dispositive of the issue in this case. Perhaps more importantly, the California Supreme Court's concession that its holding in *Rice* is contrary to the *National Railroad Passenger Corp. v. Miller* decision, demonstrates very forcibly the fact that both the decision in the instant case and in *Rice* are California decisions directly contrary to the decisions of the United States Supreme Court. For that reason alone, this petition should be granted.

## II

**THE STATE COURT DECISION IN DECLARING INVALID STATE REGULATORY STATUTES THAT REQUIRE THE SETTING OF MINIMUM PRICES FOR THE SALE OF WINE IS NOT IN ACCORD WITH DECISIONS OF THIS COURT DEFINING THE "STATE ACTION" EXEMPTION TO THE SHERMAN ANTITRUST ACT.**

An additional reason for granting the writ in this case exists in the treatment by the California courts below, in both the instant case and in the *Rice* case of the "state action" exemption to the Sherman Antitrust Act. It is petitioner's contention that the consideration of whether or not to grant this writ can turn entirely on the incorrect application of United States Supreme Court cases to the Twenty-first Amendment power granted the states in the field of alcoholic beverage regulation. However, the *Rice* case treatment of the "state action" exemption and its adoption by the Court of Appeal in the instant case has created an intolerable situation of uncertainty and confusion in this area, and one which has implications in other fields of law as well, since the "state action" exemption is obviously broader than the alcoholic beverages field.

The rationale of the *Rice* case as to the "state action" exemption which was adopted by the Court of Appeal in the instant case is described by that Court in the following quotation from footnote 3 in the instant case:

"In finding that the alcoholic beverage price maintenance scheme is not within the state action exception to the antitrust laws the California Supreme Court noted that the reason that exception does not apply

is that price fixing in the liquor industry involves private conduct, the substance of which is totally unconfined by state regulation. " "There is no control, or 'pointed re-examination,' by the state." " (21 Cal.3d at pp. 444-445.) This distinction was critical to the court's opinion in *Rice*, and the absence of state control over price maintenance relating to wine is fatal to those provisions as well as the distilled spirit provisions."

The statutes which the Court of Appeal has declared invalid in the instant case, and the statute which the *Rice* case declared invalid in that case are both found in the Alcoholic Beverage Control Act, a comprehensive and detailed series of statutes. (Section 23000 through 25762 of the Business & Professions Code of the State of California.) The *Rice* case statute (Section 24755) is found in chapter 10 of the Act entitled, "Alcoholic Beverages Fair Trade Contracts and Price Posting." The statutes involved in the instant case are found in chapter 11 entitled, "Wine Fair Trade Contracts and Price Posting." Chapter 12 is entitled "Beer Price Posting and Marketing Regulations."

Section 24749, the first section in chapter 10, declares as a matter of legislative policy:

"It is the declared policy of the State that it is necessary to regulate and control the manufacture, sale, and distribution of alcoholic beverages within this State for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to the law. In order to eliminate price wars which unduly stimulate the sale and consumption of alcoholic beverages and disrupt the orderly sale and distribution thereof, it is hereby declared as the policy of this State that the sale of alcoholic beverages should be sub-

jected to certain restrictions and regulations. The necessity for the enactment of provisions of this chapter is, therefore, declared as a matter of legislative determination."

In connection with the authority granted by both Article XX, Section 22 of the California Constitution, and the Act, the Department has promulgated extensive regulations. Several of these rules deal with wholesale and retail prices of alcoholic beverages. (See, for example, Rules 90, 99, 99.2, 100, 101 and 105, Title 4 of the California Administrative Code.)

In section 23001, the California Legislature has set forth the purposes of the Act as follows:

"This division is an exercise of the police powers of the State for the protection of the safety, welfare, health, peace, and morals of the people of the State, to eliminate the evils of unlicensed and unlawful manufacture, selling, and disposing of alcoholic beverages, and to promote temperance in the use and consumption of alcoholic beverages. It is hereby declared that the subject matter of this division involves in the highest degree the economic, social, and moral well-being and the safety of the State and of all its people. All provisions of this division shall be liberally construed for the accomplishment of these purposes."

In order to sell wine at either wholesale or retail, the manufacturer or brand owner must either enter into a fair trade contract establishing minimum prices or an effective price schedule. (Sections 24862 and 24866.) Thus, the conduct by private entities is required by state statute. These provisions have been determined by legislative declaration

to be a necessary part of the Act in regulating the "use and consumption" of alcoholic beverages in California. As is demonstrated by the length, breadth and content of the Act itself, a "comprehensive regulatory system" which is "clearly articulated and affirmatively expressed as state policy" exists in California. It would likewise seem to require no argument to support the proposition that the state is acting in its sovereign capacity in adopting the statutes and enforcing them with state officials.

Notwithstanding the above, the California Supreme Court in *Rice* and the Court of Appeal in the instant case has ruled that under the "state action" exemption, as it interprets that doctrine from the cases of *Parker v. Brown* (1942) 317 U.S. 341, *Goldfarb v. Virginia State Bar* (1974) 421 U.S. 773, *Bates v. State Bar of Arizona* (1976) 433 U.S. 350, *Cantor v. Detroit Edison Co.* (1975) 428 U.S. 579 and *Lafayette v. Louisiana Power & Light Co.* (1977) 435 U.S. 389, this legislation by the State of California's Legislature, acting as sovereign, requiring the setting of prices by the manufacturers and brand owners, and with the Department not only enforcing the statutes, but additionally, adopting regulations requiring and compelling the conduct, somehow does not qualify for the "state action" exemption. Because of the broad implications of such a holding, not only in California but in the other states as well, and not only in the field of alcoholic beverages but in all fields where private conduct, required by state law, might be said to involve a "restraint of trade", and due to the weight given California Supreme Court decisions, throughout the judicial system, this aspect of the *Rice*



decision, adopted by the Court of Appeal in the instant case, requires review by this Court.

Although the *Parker* case was decided in 1942, it still appears to be the most significant case of this Court establishing the parameters for what constitutes "state action." Petitioner finds nothing in the language or holdings of *Goldfarb*, *Bates*, *Cantor* or *Lafayette* which detracts from or is contrary to the holding in *Parker*, especially as it applies to the instant case. There is a great similarity between the facts of both the instant case and the *Rice* case and the facts of the *Parker* case, as described herein-after.

In *Parker*, the action sought to enjoin the enforcement of the state marketing plan by state officials—in the instant case the action is to restrain the enforcement of particular provisions of the Act by the Department; in *Parker*, the California Legislature had adopted a comprehensive marketing plan for raisins which included price setting—in the instant case the California Legislature adopted a comprehensive plan for regulating the sale of alcoholic beverages, including price setting; in the *Parker* case, state officials enforced the provisions of the marketing plan—in the instant case state officials enforce the price provisions of the Act. If the situation in *Parker* qualified as "state action", then it follows that the situation in the instant case constitutes "state action."

As is pointed out in the quotation from the Court of Appeal footnote above, in the instant case, the state itself does not set the price at which the articles are to be sold. The California Legislature has chosen to allow the various

manufacturers and brand owners to set the wholesale and retail prices of their own product. This results in numerous independent actions by the private sector in establishing prices as opposed to other methods of price regulation. For instance, the Legislature could have adopted a specified minimum markup such as the State of New York now has in connection with the sale of distilled spirits, (see section 101-bb of the New York Liquor Control Act) or the Legislature could have established a system wherein the state liquor administrator holds extensive and comprehensive hearings, much as a state public utilities commission does, to itself establish the prices at which the various alcoholic beverages are to be sold, as in the State of Kansas. (See section 41-1113 and 41-1114, Kansas Statutes.)

Nowhere in the reported cases does it appear that the applicability of the state action exemption depends on whether the prices are set by the manufacturer or brand owner, or by state statute or administrative hearings. Rather, the critical inquiry is directed to the question as to whether the conduct is required by state law. However, in this regard, an aspect of the *Parker* case that has been seemingly overlooked by the California Supreme Court in the *Rice* decision is the fact that as a practical matter the private growers in California, in *Parker*, did set the prices at which raisins were to be marketed. Additionally, the conduct, selling at "fixed" prices, was not "required" of the raisin growers since the growers in any particular district had to first initiate the request for the institution of a plan. Further, after a plan, including the price setting features, was adopted and reviewed by a state commission, it never-

theless had to be resubmitted to the growers for their final approval by referendum vote. Consequently, if the growers did not like the plan as approved or modified by the state, they could reject it and presumably start the process over again until a plan was approved by the state commission that was also "approved" by the growers. It can reasonably be said, therefore, that the conduct in the *Parker* case was not only initiated by the private sector without compulsion of law, but that the private sector, in effect, set the prices. Contrast this situation with that of the typical public utility commission situation, wherein the private utility submits a request for rate increase which may or may not be approved by the commission. The private utility does not have the option of rejecting or accepting the commission's action on its request as the raisin growers did in California in the *Parker* case.

This facet of the *Parker* case, overlooked by the California Supreme Court in *Rice*, is illustrated by the following quotation from page 352 of the *Parker* decision:

"... Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the commission, must also be approved by referendum of producers, it is the state, acting through the commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy..." (Emphasis ours.)

Of the five most frequently cited cases involving the "state action" exemption, cited above, *Cantor* and *Goldfarb*, in denying the application of the exemption, have no application on their facts which would call for denial of the exemption to the instant case. In *Cantor*, where the utility

was furnishing free light globes as part of its rate structure to its customer there was no state-wide policy or statute that related to the furnishing of light globes, nor was the conduct of the utility in furnishing the free light globes compelled. The public utilities commission had merely approved the inclusion in the rate structure of the light globe give-away. In the instant case, the conduct is both required and part of a state-wide policy.

In *Goldfarb*, which involved the establishing of minimum fee schedules by bar associations for lawyers, there was no Virginia statute compelling or even approving such a practice, as this Court pointed out in the *Lafayette* case, at page 409, referring to *Goldfarb*:

"... But no Virginia statute referred to lawyers' fees and the Supreme Court of Virginia had taken no action requiring the use of and adherence to minimum fee schedules. *Goldfarb* therefore held that it could not be said that the anticompetitive effects of minimum fee schedules were directed by the State acting as sovereign. Id., at 791. The State Bar, though acting within its broad powers, had 'voluntarily joined in what is essentially a private anticompetitive activity,' id., at 792, and was not executing the mandate of the State. . . ."

*Cantor* is significant to the instant case in its recognition that:

"Unquestionably there are examples of economic regulation in which the very purpose of the government control is to avoid the consequences of unrestrained competition. Agricultural marketing programs, such as that involved in *Parker*, were of that character . . ." (Page 595.)



*Bates* upheld anticompetitive conduct as "state action", namely, the prohibition of advertising by lawyers in Arizona, since as was pointed out in the *Lafayette* case at page 410, in referring to *Bates*:

"We emphasized, moreover, the significance to our conclusion of the fact that the state policy requiring the anticompetitive restraint as part of a comprehensive regulatory system, was one clearly articulated and affirmatively expressed as state policy, and that the State's policy was actively supervised by the State Supreme Court as the policymaker."

In the instant case, we have a "comprehensive regulatory system", which is "clearly articulated and affirmatively expressed" and the "state's policy was actively supervised" by the Department both by way of adopting administrative regulations and the active enforcement of both the regulations and the Act as demonstrated by the *Rice* case and the instant case.

In rejecting the "state action" exemption in the *Rice* case, the California Supreme Court ignored what appears to be the basic question in the *Lafayette* case, namely, whether or not the conduct complained of, i.e., the "tying" arrangement, was compelled or required by the state. The only reference to the *Lafayette* case in the *Rice* decision is contained in a reference in a footnote (fn. 7, p. 443) in which the Court simply notes that "the United States Supreme Court distinguished *Cantor* on the ground that it involved anticompetitive activities of private parties." While it is true that this Court apparently placed the City of Lafayette in its role as a public utility somewhere between a "state" and a "private party," nevertheless, the

reasonable interpretation of this Court's ruling in *Lafayette* is that the conduct complained of was a restraint of trade which the City of Lafayette could not engage in unless it was required by state law. It thus appears that *Lafayette* supports the application of the "state action" exemption in the instant case.

In any event, petitioner urges that the California Supreme Court decision in *Rice*, and the decision of the Court of Appeal in the instant case in declaring that the state statutes involved are not saved by the "state action" exemption to the Sherman Antitrust Act are in conflict with the decisions of this Court setting forth the parameters of the "state action" exemption.

### III

#### THE STATE COURT DECISIONS HAVE CREATED CONFUSION AND UNCERTAINTY AS TO THE VALIDITY OF ANY STATE ALCOHOLIC BEVERAGE STATUTE WHERE IT CAN BE ARGUED THAT COMPLIANCE WITH THE STATUTE CONSTITUTES A "RESTRAINT OF TRADE."

##### (A) The California Situation.

The *Rice* case decision declared price maintenance provisions at the consumer level relating to distilled spirits to be invalid under the Sherman Antitrust Act. In the *Capiscean* case a California Court of Appeal extended the *Rice* rule to include consumer price maintenance for wine. In the instant *Midcal* case, the Court of Appeal further extended the *Rice* case to include not only a declaration of invalidity of consumer price maintenance for wine, but also a declaration of invalidity of the price posting of the

wholesaler to retailer prices for wine. In the application for a writ in the *Farmer's Market, Inc.* case, (referred to supra under Statement of the Case) filed in the same Court of Appeal that decided the instant case, it is alleged that beer and distilled spirits price posting provisions wholesale to retail are likewise invalid under the *Rice* case and the *Midcal* case. The Alcoholic Beverage Control Appeals Board, in reviewing a decision of the Department, although recognizing its inability to declare a statute invalid as contrary to federal law, has nevertheless clearly indicated that it would otherwise hold that the beer price posting wholesale to retail statute (Section 25000) is invalid under the *Rice* case, and the requirement in the California Act that a beer manufacturer designate a beer distributor (Section 25000.5) for an exclusive territory to distribute beer is likewise invalid as a restraint of trade under the rationale of the *Rice* case. That case is presently pending in the First District Court of Appeal, Division 3, in California being 1 Civil No. 47118, *Anthony C. Ferrigno dba Consumers Distributing v. Alcoholic Beverage Control Appeals Board; Department of Alcoholic Beverage Control, Real Party in Interest*.

The effect of the *Rice* case and the instant *Midcal* case has been to put the alcoholic beverage regulation in California into a state of great confusion and uncertainty, not to mention the disastrous effect that it has had on retailers and will have on all segments of the industry and regulation if the uncertainty and confusion is allowed to continue.

Under the present state of uncertainty and confusion a lawyer would be remiss if in any disciplinary action against an alcoholic beverage licensee in California he failed to

raise the question about whether or not the particular statute that his client is being charged with violating is in any way a "restraint of trade." It would be the lawyer's duty to the client to raise the antitrust question under the *Rice* and *Midcal* cases. Likewise, it would appear that any licensee that felt that somehow he was caught between statutory requirements that he comply with California law on the one hand, or disobey California law on the other hand on the basis that compliance could constitute a violation of the Sherman Antitrust Act, would be compelled to seek judicial relief by way of declaratory relief in a Court of Appeal in California.

The situation in California will continue to spawn more needless litigation and should therefore be quickly resolved. The *Rice* and *Midcal* decisions have also created uncertainty as to the validity of any legislation that might be passed by the California Legislature to attempt to cure the problems created by the California judicial decisions.

#### **(B) Effect on New York and Other States.**

The State of New York also has a comprehensive scheme of regulation in the field of alcoholic beverages which includes such aspects as minimum markup at retail, price affirmation, and wine fair trade contracts to mention several that are related to the California Court decisions.

As mentioned earlier, the price affirmation statute in New York, and presumably its wholesale to retail price posting requirement was upheld in the *Seagrams* case in 1966 by this Court. However, if the analysis in *Rice* of the effect of the Twenty-first Amendment is correct then a serious question arises as to the current validity of the

*Seagrams* case, and concurrently the validity of the New York law involved in *Seagrams*.

The wine fair trade contract provisions of New York law are the subject of litigation in at least one case in New York at the present time. *In the Matter of William J. Mezzetti Associates, Inc. v. State Liquor Authority* (1978) 410 N.Y.S.2d 893, is presently pending before the Court of Appeal of New York with a motion for leave to appeal having been granted, but with the appeal taken as of right dismissed without costs as indicated by the excerpt from the New York Law Journal (Exhibit "I"). In the *Mezzetti* case, in the Appellate Division of the Supreme Court in New York, the Court upheld the validity of the New York wine fair trade statute against the allegations that it violated the Sherman Antitrust Act. That Court stated, in its short memorandum opinion:

"Section 101-bbb of the Alcoholic Beverage Control Law falls well within the intended scope of the Twenty-first Amendment to the United States Constitution and constitutes State action which does not conflict with the Sherman Antitrust Act (see *Matter of Theodore Polon, Inc. v. State Liq. Auth.*, 59 A.D.2d 946, 399 N.Y.S.2d 469). We have considered petitioner's other contentions and find them to be without merit."

However, in a concurring opinion, Justice Suozzi expressed a preference for the holding of the *Rice* case, stating:

"I concur in the result reached by the majority solely on constraint of *Polon*. However, it is my view that section 101-bbb of the Alcoholic Beverage Control Law is violative of the Sherman Antitrust Act

and, in that regard, I agree with the well-reasoned opinion of the Supreme Court of California in *Rice v. Alcoholic Beverage Control Appeals Bd.*, 21 Cal.3d 431, 146 Cal.Rptr. 585, 579 P.2d 476, which struck down a statute virtually identical to the one at bar as violative of the Sherman Antitrust Act."

As indicated by the concurring opinion by the Appellate Division Justice in *Mezzetti*, the decision of California's Supreme Court is given wide circulation and traditionally and typically the California Supreme Court has been looked to by the courts of other states of the Union as being a leader in judicial performance and in the logic and reasoning involved in a typical opinion from that Court. The reputation of the California Court thus will lead to more uncertainty and confusion in other states than might otherwise be the case from some other courts.

As described earlier, there are some fourteen other states that have similar wholesale to retail price posting for alcoholic beverages. (See Appendix F.) The present status of the California cases, including both the instant case and the *Rice* case, of necessity has created great uncertainty and confusion about the validity of those statutes in these other states. Additionally, legislation that may be proposed in other states is subject to the same uncertainty and confusion as a result of the California decisions, as was described in the California section above.

### **(C) Threat of Civil and Criminal Prosecution Under the Sherman Antitrust Act.**

In the instant case, the *Midcal* court indicates one of the serious problems created by the present situation with



regard to the validity of all of the sections of the Act, or of the statutes of any other state which may be now argued to be "restraint of trade" under *Rice* or *Midcal*.

At page 982, of the Court of Appeal decision, the situation is described thusly:

"... [P]etitioner is placed in the untenable position of having to choose to obey possibly conflicting federal and state laws and face a penalty under the one it chooses to disobey..."

California licensees at all levels of the industry are now in the unenviable position of being uncertain as to whether or not to comply with various provisions of the Alcoholic Beverage Control Act and thus face potential civil or criminal Sherman Act litigation if it is alleged the conduct thus required by state law is in "restraint of trade."

This most unsatisfactory situation with its widespread repercussions throughout the entire alcoholic beverage industry was created by the California Courts' decisions in the *Rice* and *Midcal* cases and must be finally resolved in order to eliminate the intolerable situation thus created.

It is therefore imperative that this Court, the only Court that can resolve the issue once and for all, grant this writ and rule definitively on the precise questions presented in this case, namely, whether or not the California wholesale to retail price posting requirements for wine and the California retail to consumer price maintenance provisions for wine are proper and valid legislation under the Twenty-first Amendment, notwithstanding the Sherman Antitrust Act, and whether or not action required by state statute as part of a comprehensive regulatory scheme in

the field of alcoholic beverages is conduct that is exempt from the Sherman Antitrust Act under the "state action" exemption.

### CONCLUSION

For all of the foregoing reasons, this Court should grant certiorari.

Dated: July 12, 1979.

Respectfully submitted,

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(Appendices Follow)

## **Appendices**

**Appendix A**

In the Court of Appeal  
of the  
State of California

Third Appellate District

3 Civil No. 17992

Mideal Aluminum, Inc.,	Petitioner,
vs.	
Baxter Rice, as Director, etc.,	Repondent;
California Retail Liquor Dealers Association,	Intervener.

[Filed Mar. 26, 1979]

**OPINION**

REYNOSO, J.—The recent Supreme Court opinion in *Rice v. Alcoholic Bev. etc. Appeals Bd.* (1978) 21 Cal.3d 431 [146 Cal.Rptr. 585, 579 P.2d 476], which invalidated California's price maintenance laws relating to retail sales of distilled spirits, gives rise to this litigation. By writ of mandate Mideal Aluminum, Inc., seeks a determination as to the validity of the fair trade and price posting laws regulating the sale, both wholesale and retail, of wine in this state. We hold, as a logical axle of the *Rice* wheel, that the fair trade and price posting laws relating to wine are invalid—at the wholesale and retail level.

### 1. *The Background*

An accusation was filed against petitioner before the Department of Alcoholic Beverage Control charging that on or about July 21, 1978, it sold or caused to be sold to a licensed retailer 27 cases of wine at prices less than the selling prices contained in the effective price schedule filed with the department by the E & J Gallo Winery. The second count charged that petitioner had sold or had caused to be sold to certain retailers wine for which there was no effective fair trade contract duly filed with the department. The petitioner stipulated to the truthfulness of the facts set forth in the accusation.

Petitioner entered into a further stipulation that "[T]he Department may, subject to a judicial determination of the constitutionality of Section 24850 et seq., Business and Professions Code and Rule 101 of Chapter 1, Title 4, California Administrative Code, impose a monetary penalty or suspension of [petitioner's] licenses as provided in Section 24880 of the Business and Professions Code."<sup>1</sup> Petitioner proceeded to file its petition for writ of mandate in this court.<sup>2</sup>

### 2. *Mandate Proceedings*

(1) Mandate is an appropriate writ for the review of the exercise of quasi-judicial power by a constitutionally

<sup>1</sup>All statutory references are to the Business and Professions Code.

<sup>2</sup>The California Retail Liquor Dealers Association sought, and was granted, leave to file a complaint in intervention opposing the petition for a writ of mandate. This court subsequently issued an alternative writ of mandate and stayed further action on the accusation against petitioner. We stayed further action in enforcing the price posting provisions of the Alcoholic Beverage Control Act as to any licensee insofar as that act required the posting of minimum retail prices at which wines may be sold to the public.

authorized statewide agency such as the Department of Alcoholic Beverage Control. (*Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 7 [95 Cal.Rptr. 329, 485 P.2d 529, 46 A.L.R.3d 351].) The writ is particularly appropriate in light of the following. First, petitioner attacks the validity of the fair trade and price posting laws on their face; no material facts are in dispute. Second, important issues of statewide significance are raised. Third, petitioner is placed in the untenable position of having to choose to obey possibly conflicting federal and state laws and face a penalty under the one it chooses to disobey. Under such circumstances it would be improper to require petitioner to exhaust its administrative remedies. (*Sail'er Inn Inc. v. Kirby, supra*, 5 Cal.3d at pp. 6-7.)

We do not share respondent's fear that our assuming jurisdiction in this case will herald the inundation of similar petitions, attempting to bypass the Alcoholic Beverage Control Appeals Board for review of mere disciplinary orders through feigned constitutional issues. Petitioner has conceded the factual basis for the accusation and questions only the validity of the law. We do not review the accusation; we consider only the validity of the fair trade and price posting laws. It is doubtful that licensees in like position will feign constitutional issues; it is understood that if those issues are rejected the licensee will be left before the Department to face accusations which it has admitted.

### 3. *The Rice Rationale*

In *Rice v. Alcoholic Bev. etc. Appeals Bd., supra*, 21 Cal. 3d 431, the California Supreme Court held that the fair

trade laws relating to the retail sale of distilled spirits violate the Sherman Anti-Trust Act (15 U.S.C. § 1 et seq.).<sup>3</sup> Their invalidity necessarily followed. In reaching its decision the court considered whether the fair trade laws are within the "state action" exception to the Sherman Anti-trust Act and whether the Twenty-first Amendment to the United States Constitution allowed the state to enact such laws. Neither the state action exception nor the Twenty-first Amendment was found to provide a basis for upholding the fair trade laws relating to retail sale of distilled spirits.

(2) The statutes and regulations relating to price maintenance of wine challenged in this proceeding bear no significant differences to the statutes and regulations relating to price maintenance of distilled spirits found to be

<sup>3</sup>The intervenor suggests that a recent United States Supreme Court decision, *New Motor Vehicle Bd. v. Orrin W. Fox Co.* (1978)—U.S.—[58 L.Ed.2d 361, 99 S.Ct.—], casts doubt upon the reasoning of the California Supreme Court in *Rice*. Applicable statutes require an automobile manufacturer to obtain approval of the California New Motor Vehicle Board before opening or relocating a retail dealership within the market area of an existing franchise if the latter protests. Upon receiving a protest from an existing dealer the manufacturer is not allowed to establish or relocate the proposed dealership until the Board holds a hearing and determines that there is not good cause for refusing to permit the establishment of the dealership. The United States Supreme Court held that the law is within the state action exception to the Sherman Anti-Trust Act. The court noted that a dealer protest serves only to trigger board action, the state does not attempt to authorize or immunize private conduct violative of the antitrust laws.

In finding that the alcoholic beverage price maintenance scheme is not within the state action exception to the antitrust laws the California Supreme Court noted that the reason that exception does not apply is that price fixing in the liquor industry involves private conduct, the substance of which is totally unconfined by state regulation. "There is no control, or 'pointed re-examination,' by the state." (21 Cal.3d at pp. 444-445.) This distinction was critical to the court's opinion in *Rice*, and the absence of state control over price maintenance relating to wine is fatal to those provisions as well as the distilled spirit provisions.

invalid in *Rice v. Alcoholic Bev. etc. Appeals Bd.*, *supra*, 21 Cal.3d 431. Under Business and Professions Code section 24862 no licensee may sell or resell to a retailer, and no retailer may buy any item of wine except at the selling or resale price contained in an effective price schedule or in an effective fair trade contract. No licensee is permitted to sell or resell to any consumer any item of wine at less than the selling or resale price contained in an effective price schedule or fair trade contract. Under section 24866 each grower, wholesaler, wine rectifier or rectifier must make and file fair trade contracts and/or file schedules of the resale prices of wines. These sections result in price fixing in wine identical to that found to be repugnant to the Sherman Anti-Trust Act when applied to distilled spirits. (See *Rice v. Alcoholic Bev. etc. Appeals Bd.*, *supra*, 21 Cal.3d at pp. 445-446; see also, *Capiscean Corporation v. Alcoholic Bev. etc. Appeals Bd.* (1979) 87 Cal.App.3d 996 [151 Cal.Rptr. 492], holding the price maintenance provisions relating to the retail price of wine to be invalid under *Rice*.) Our consideration is controlled by the reasoning of the Supreme Court in *Rice*. Unless there appears an independent basis for upholding the fair trade laws relating to wine we must declare those laws to be invalid.

We do not find the provisions of the fair trade laws relative to wholesale price maintenance different from those relative to retail price maintenance. Price fixing, whether at the wholesale or retail level, is violative of the Sherman Anti-Trust Act. (See *United States v. Topco Associates* (1971) 405 U.S. 596, 611-612 [31 L.Ed.2d 515, 527-528, 92 S.Ct. 1126]; *Kiefer-Stewart v. Seagram & Sons* (340 U.S. 211, 213-214 [95 L.Ed. 219, 223-224, 71 S.Ct. 259]; *United*



*States v. Bausch & Lomb Co.* (1943) 321 U.S. 707, 720 [88 L.Ed. 1024, 1033, 64 S.Ct. 805]; *Dr. Miles Med. Co. v. John D. Park & Sons Co.* (1910) 220 U.S. 373 [55 L.Ed. 502, 31 S.Ct. 376].) The wholesale price maintenance provisions relating to wine cannot be upheld for the same reasons the retail price maintenance provisions were declared invalid in *Rice*.

The intervenor suggests that the distinction between wine and distilled spirits renders *Rice* inapplicable. We cannot agree. All of the considerations involved in *Rice* apply to wine as well as to distilled spirits. Thus, the court in *Rice* noted that the price maintenance provisions have resulted in the elimination of any semblance of competition within the industry and that the consumer pays about the highest retail prices for liquor, beer and wine in the country, although the state levies one of the lowest excise taxes on these beverages. (21 Cal.3d at p. 455. See 1 Sen. Select Com. Rep. on Laws Relating to Alcoholic Beverages (1974) pp. 9 and 82-83.)

The purpose of the price maintenance provisions, to promote temperance and orderly marketing conditions, can be achieved by other means in regard to wine as well as distilled spirits. (See 21 Cal.3d at pp. 456-457.) The declared purposes of the fair trade laws relating to alcoholic beverages do not indicate that the protection of the California wine industry was a legislative consideration, nor do we find anything in the act so to suggest. (See Bus. & Prof. Code, § 24749.) That the provisions do not distinguish between California wines and imported wines indicates that protection of the California wine industry was not the pur-

pose of the enactment of the provisions, as does the fact that the provisions are identical in result and operation to the distilled spirit price maintenance provisions. We conclude that the wine price maintenance provisions of the Business and Professions Code violate the Sherman Anti-Trust Act. See *Capiscean Corporation v. Alcoholic Bev. etc. Appeals Bd.*, *supra*, 87 Cal.App.3d 996.)<sup>4</sup>

#### 5. Nonseverability

Respondent argues that the wholesale price posting requirements are valid and should be severed from the invalid portions of the statutes. We have noted that we find wholesale price fixing to be invalid. Intervenor suggests that portions of sections 24862 and 24866 merely require each distributor to post a schedule of prices at which he will sell to retailers. The exchange of price information is not a violation of the antitrust laws when the exchange does not amount to price fixing. (*Treasure Val.*

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<sup>4</sup>The intervenor urges that the price maintenance provisions relating to wine are within the "state action" exception to the Sherman Anti-Trust Act and that the Twenty-first Amendment to the United States Constitution grants to the state the power to pass such laws over liquor. Essentially, intervenor asks us to reconsider our Supreme Court's decision in *Rice*. We may do so, it is urged, because that court relied exclusively on federal law in declaring the price maintenance provisions relating to retail distilled spirits sales invalid, and, in intervenor's view, the court erred in interpreting federal law. We disagree with intervenor's view that the decisions of the California Supreme Court are open to reconsideration by a California Court of Appeal. As an appellate court we are bound by the decisions of the California Supreme Court. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 [20 Cal.Rptr. 321, 369 P.2d 937].) The California Supreme Court carefully considered whether the California liquor price maintenance scheme was within the state action exception or saved by the Twenty-first Amendment, and concluded that neither exception applied. (*Rice*, *supra*, 21 Cal.3d at pp. 441-444, 447-457.) We are bound by that decision.

*Potato Bar. Ass'n. v. Ore-Ida Foods, Inc.* (9th Cir. 1974) 497 F.2d 203, cert. den. 419 U.S. 999 [42 L.Ed.2d 273, 95 S.Ct. 314]; *Gray v. Shell Oil Co.* (9th Cir. 1972) 469 F.2d 742, cert. den. 412 U.S. 943 [37 L.Ed.2d 403, 93 S.Ct. 2773].) Further, it is argued, a requirement that wine distributors file with the department a list of their selling prices to retailers is not invalid.

Respondent and intervener misread Business and Professions Code section 24866. That section requires: (1) each wine grower, wholesaler licensed to sell wine, and wine recitifier to post a schedule of selling prices of wine to retailers or consumers for which the resale price is not governed by a fair trade contract made by the person who owns or controls the brand, and (2) each of those entities to make and file a fair trade contract and a schedule of resale prices if a brand of wine is owned or controlled by them. Section 24862 provides that no licensee shall sell to a retailer, and no retailer shall buy any item of wine except at the selling or resale price contained in an effective price schedule or in an effective fair trade contract. A price schedule filed under section 24866 must contain the same information that a fair trade contract is required to contain, including selling and resale prices to retailers and consumers. (Bus. & Prof. Code § 24869.)

The legislative scheme is not one which merely requires each distributor to specify prices. The scheme, as we explain, is for the purpose of fixing prices. No distributor is required to post such a schedule where a fair trade contract governs the price. Thus, the price posting requirements are intended to reach the same result as a fair trade

contract. That identical information is required in a price schedule as in a fair trade contract supports our conclusion. The provisions of the Business and Professions Code relating to distilled spirits require a "schedule" of prices to be filed which fixes the prices (§ 24755), while a "price list" required to be filed by each distributor merely contains the prices. (§ 24756) There is no requirement that each wine distributor file a "price list"; the requirement is only that distributors file a "price schedule" where a fair trade contract does not govern. The use of the word "schedule" rather than "list" indicates that price fixing is the intended result of the price posting requirements. We note that the department has interpreted the price schedule filed by one distributor to bind other distributors of the same brand of wine. The regulations of the department provide that only one distributor may file a price schedule for any brand of wine in a trading area. (Cal. Admin. Code, tit. 4, § 101 subd. (g).) Consequently, one of the charges against petitioner is that it sold wine for less than the price contained in a price schedule filed by E & J Gallo Winery.

As we interpret sections 24862 and 24866, the schedule of selling prices which must be filed where no fair trade contract governs binds other distributors to sell at the "scheduled" prices. The difference between fair trade contract control of prices and the price posting system is one of form rather than substance. (See *Rice v. Alcoholic Bev. etc. Appeals Bd.*, *supra*, 21 Cal.3d at p. 438.) We conclude that the price posting provisions result in price fixing and are invalid for that reason.

Let a peremptory writ of mandate issue ordering respondent to refrain from enforcing the fair trade and wine price posting provisions of the Alcoholic Beverage Control Act.<sup>5</sup>

Puglia, P. J., and Evans, J., concurred.

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<sup>5</sup>More particularly, the following shall not be enforced: section 24850 et seq., and more particularly, sections 24862 and 24866 of the Business and Professions Code, and the regulations promulgated pursuant thereto, and more particularly section 101, chapter 1, title 4, California Administrative Code.

**Appendix B**

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Clerk's Office, Supreme Court  
4250 State Building

San Francisco, California 94102

May 24, 1979

I have this day filed Order

HEARING DENIED

In re: 3 Civ. No. 17992

Mideal Aluminum, Inc.

vs.

Rice

Respectfully,

G. E. BISHEL  
Clerk

**Appendix C**

In the Supreme Court  
of the  
State of California

Baxter Rice, as Director, etc.,  
Petitioner,  
vs.

Alcoholic Beverage Control Appeals  
Board,  
Respondent;

Christine T. Corsetti et al.,  
Real Parties in Interest.

S.F. No. 23631

Young's Market Company et al.,  
Petitioners,  
vs.

Alcoholic Beverage Control Appeals  
Board,  
Respondent;

Christine T. Corsetti et al.,  
Real Parties in Interest.

S.F. No. 23632

[Filed May 30, 1978]

**OPINION**

Mosk, J.—Section 24755 of the Business and Professions Code requires that a manufacturer or brand owner file with the Department of Alcoholic Beverage Control (department) a minimum price schedule for distilled spirits which bear the brand name of the owner (subds. (a), (c)),



and it prohibits an off-sale retail licensee from selling at less than that prescribed price (subd. (f)).<sup>1</sup> In this proceeding, we are called upon to decide whether this provision and the regulations of the department implementing

<sup>1</sup>All references will be to the Business and Professions Code unless otherwise noted.

Section 24755 provides in part: "(a) No package of distilled spirits which bears the brand, trademark or name of the owner or person in control shall be sold at retail in this state for consumption off the license premises unless a minimum retail price for such package first shall have been filed with the department in accordance with the provisions of this section.

"(b) A price for each of such packages shall be in a minimum retail price schedule setting forth with respect to each package the exact brand, trademark or name, capacity, and type of package, type of distilled spirits, age and proof, where stated on the label, and the minimum selling price at retail. The price for any such package may be filed separately and differently for the trading area of southern California and the trading area of northern California. The trading area of southern California shall consist of the Counties of Santa Barbara, Ventura, Los Angeles, Orange, Riverside, San Bernardino, Imperial and San Diego. The northern California trading area shall consist of the other counties of the state. No more than one person shall file a schedule for the same package for the same trading area.

"(c) Such schedule shall be filed by (1) the owner of the brand, if licensed in the state; (2) any licensee, other than a retailer, selling the brand and who is authorized in writing by the brand owner to file such schedule if the brand owner is not licensed in this state; (3) a manufacturer or rectifier licensed in this state and who bottles under the brand owned by a retailer; or (4) any licensee with the approval of the department, if the owner of the brand does not file or is unable to file a schedule or authorize a licensee other than a retailer to file such schedule.

"(d) Schedules filed pursuant to this section may be amended, changed, or modified by filing such amendments, change, or modification with the department on or before the 15th day of any month to take effect on the first day of the second succeeding calendar month; except that prices filed for a brand, size, or type not included in a schedule in effect at the time such brand, size, or type is filed, and prices filed to meet the price of a competitive brand, may be filed on or before the 15th day of any month to take effect on the first day of the following month. For the purpose of this section, a competitive brand shall mean any brand of the same type of distilled spirits having a filed selling price at retail within

it (Cal. Admin. Code, tit. 4, § 99, subd. (a)) conflict with the Sherman Antitrust Act (15 U.S.C. § 1 et seq.), which declares combinations in restraint of trade illegal.<sup>2</sup>

On November 25, 1975, real parties in interest, Christine and Richard Corsetti (Corsetti), doing business as Bob's Market, sold a bottle of Christian Brothers brandy to an employee of the department for \$1.80 less than the posted price, and one of Courvoisier cognac for \$1.75 less than the posted price. On December 4, they sold two bottles of Johnny Walker scotch whiskey and two bottles of Christian Brothers brandy for \$2.30 and \$2.58 less than the posted price, respectively. After a hearing, the department suspended Corsetti's license for 10 days. On appeal to the Alcoholic Beverage Control Appeals Board (the board), Corsetti sought to have the order of the department annulled, claiming that section 24755 is invalid as a violation of the Sherman Antitrust Act (Sherman Act), and that it violates equal protection of the laws. The board agreed with these

one dollar (\$1) per gallon of the brand for which a competitive price is filed.

"The department shall reject any price schedule which does not comply with this subdivision.

"(e) A price schedule or amendment, change or modification thereof as provided for by this section shall be deemed filed when received, either by personal delivery or mail, at the headquarters office of the department in Sacramento. Upon such filing, a price schedule or amendment, change or modification thereof shall become a public record. Such filing of a price schedule or amendment, change or modification thereof shall constitute constructive notice of its contents to any licensee affected thereby.

"(f) No off-sale licensee shall sell any package of distilled spirits at any price less than the effective filed price of such package unless written permission is granted by the department, for good cause shown and for reasons not inconsistent with this division."

<sup>2</sup>For convenience, we shall refer only to section 24755 in our discussion. Obviously, our conclusion regarding the validity of the provision will also apply to the department's rule implementing the section.

contentions and reversed the decision of the department.<sup>3</sup> (1) (See fn.4.) The department seeks to annul the board's order.<sup>4</sup>

The two issues we must consider in deciding the constitutionality of section 24755 are whether the section violates the Sherman Act, and if so, whether the Twenty-first Amendment to the United States Constitution nevertheless affords the states sufficiently broad powers over the sale and distribution of alcohol that fair trade laws pertaining to alcohol are valid despite the conflict.

<sup>3</sup>Corsetti also asserted before the board that the evidence was insufficient to support the findings that he had violated section 24755, and that the penalty was improper. The board upheld the department's findings in these respects, and Corsetti does not challenge these aspects of the board's decisions.

<sup>4</sup>Young's Market Company and other wholesale distributors of alcoholic beverages (Young's) also sought review. However, their petition must be denied because they were not parties to the proceedings before the board.

Under article XX, section 22, of the California Constitution, orders of the board are subject to judicial review "upon petition of . . . any party aggrieved by such order." Section 23090 allows "any person" affected by a final order of the board to apply for a writ of review. However, section 23090.3 states that the "board . . . and each party to the action or proceeding before the board shall have the right to appear in the review proceeding," and under section 23090.4, a copy of the pleadings must be served "on each party" who appeared before the board.

We hold that these provisions read as a whole, limit the right of review of the board's decision to parties who appeared before the board. This limitation is consistent with the rule followed by appellate courts in reviewing the actions of trial courts. In such cases a person who is not a party of record to the proceeding below has no standing to appeal. (*Eggert v. Pac. States S. & L. Co.* (1942) 20 Cal.2d 199 [124 P.2d 815]; *City of Downey v. Johnson* (1968) 263 Cal.App.2d 775, 782 [69 Cal.Rptr. 830]; *People v. United Bonding Ins. Co.* (1969) 272 Cal.App.2d 441, 442 [77 Cal.Rptr. 310].) Young's Market did not appear below and therefore has no right to seek review here.

Section 2 of the Twenty-first Amendment provides, "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." The Sherman Act, which derives its authority from the commerce clause (U.S. Const., art. I, § 8, subd. (3)) would, of course, prevail over state fair trade laws under the supremacy clause (U.S. Const., art. VI, § 2), unless the special powers granted to the states over alcohol by the Twenty-first Amendment allow the states to enact such laws.

# I

Before reaching the merits of the issues before us, it is helpful to review the history of the federal and state statutes upon which our decision turns.

As originally enacted in 1890, section 1 of the Sherman Act contained a single simple sentence: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." (26 Stat. 209.) In 1937 Congress passed the Miller-Tydings Act as an amendment to section 1. The amendment excepted from the provisions of the section "contracts . . . prescribing minimum prices for the resale" of certain commodities in intrastate commerce, if such contracts were lawful under state law. (50 Stat. 693.)

Some states, including California (Stats. 1933, ch. 260, p. 793) and Louisiana (La.Gen.Stats. § 9809.1 et seq.) had enacted so-called non-signer provisions. These statutes authorized the imposition of a minimum price upon a retailer

who had not entered into a contract with a wholesaler or distributor specifying such a price, if the wholesaler or distributor had concluded a contract for a minimum price with any retailer, i.e., all retailers were bound by a minimum price agreed to by any retailer. In *Schwegmann Bros. v. Calvert Corp.* (1951) 341 U.S. 384 [95 L.Ed. 1035, 71 S.Ct. 745, 19 A.L.R.2d 1119], the United States Supreme Court held a nonsigner provision in the Louisiana law invalid under the Sherman Act on the ground that the Miller-Tydings exception authorized states to allow the fixing of minimum prices only if a retailer consented by contract with a wholesaler to abide by such prices, whereas the Louisiana statute coerced retailers to abide by a price to which they had not agreed.

In the year following the *Schwegmann* decision, Congress responded by passing the McGuire Act (66 Stat. 632), which declared that nonsigner provisions were not unlawful under the Sherman Act.

California initially allowed resale price maintenance only by contract between a retailer and wholesaler (Stats. 1931, ch. 278, p. 583) but, as we have seen, in 1933 a nonsigner provision was enacted.<sup>5</sup> It was not until 1961 that section 24755 was amended to allow control of the price of liquor by means of the filing with the department of a minimum retail price which all retailers are required to observe. The change from the nonsigner mode of controlling retail prices to the present price-posting system is one of form rather than substance. (*Samson Market Co. v. Alcoholic*

<sup>5</sup>Section 24750 still allows fair trade contracts for the resale of alcoholic beverages, and section 24752 prohibits retail sales below that price, whether or not a party has signed the contract.

*Bev. etc. Appeals Bd.* (1969) 71 Cal.2d 1215, 1220 [81 Cal. Rptr. 251, 459 P.2d 667].)

The board's determination that section 24755 violates the Sherman Act was based upon the repeal by Congress of the Miller-Tydings Act and the McGuire Act by the Consumer Goods Pricing Act of 1975 (89 Stat. 801), the public interest in free competition, and the "changed circumstances in law and fact" since this court upheld the validity of the retail price maintenance laws in *Allied Properties v. Dept. of Alcoholic Beverage Control* (1959) 53 Cal.2d 141 [346 P.2d 737] and *Wilke & Holzheiser, Inc. v. Dept. of Alcoholic Bev. Control* (1966) 65 Cal.2d 349 [55 Cal.Rptr. 23, 420 P.2d 735].

The board reasoned as follows: The repeal of the Miller-Tydings Act and McGuire Act exemptions to the Sherman Act, as well as the repeal of California fair trade laws relating to products other than liquor (Stats. 1975, ch. 402, p. 878), reflects a growing apprehension that fair trade laws are not in the public interest. Price fixing for whatever purpose requires close scrutiny, and a number of recent studies have cast doubt upon the underlying justification for fair trade laws. These studies reveal that the absence of fair trade laws does not harm small business and has no significant effect upon the consumption of alcohol or temperance. The California consumer pays more than the residents of any other state for alcoholic beverages because of the fair trade laws; liquor distributors reap the benefit of these high prices. Price fixing among producers has "resulted in the elimination of any semblance of competition within the industry." In view of these factors, which demon-



strate that there has been a change in circumstances since *Allied Properties* and *Wilke & Holzheiser, Inc.* were decided (citing *Brown v. Merlo* (1973) 8 Cal.3d 855 [106 Cal.Rptr. 388, 506 P.2d 212, 66 A.L.R.3d 505]; *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804 [119 Cal.Rptr. 858, 532 P.2d 1226, 78 A.L.R.3d 393]), the retail price maintenance provision set forth in section 24755 is no longer justified.<sup>6</sup>

The board also determined that the Twenty-first Amendment does not "negate the commerce clause" and that under our decision in *Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 11 [95 Cal.Rptr. 329, 485 P.2d 529, 46 A.L.R.3d 351], the objectives of the Sherman Act and the Twenty-first Amendment must be weighed against one another in order to determine which shall prevail. It concluded that, in view of the matters referred to above, the Sherman Act should govern, and that, since section 24755 is in conflict with the Sherman Act, it is invalid.

## II

(2) Our first inquiry is whether retail price maintenance provisions of section 24755 violate the Sherman Act in its present form, i.e., without the exemptions previously afforded by the Miller-Tydings Act and the McGuire Act.

We begin with the proposition that if the conduct of the liquor producers in fixing minimum retail prices did not have governmental sanction or if the imposition of minimum prices upon retailers was not required by the state, but

<sup>6</sup>The studies upon which the board based its determination will be discussed *infra*. The board based its conclusion that section 24755 violates equal protection of the laws upon these same "changed circumstances."

was discretionary with the producer, there would be a clear violation of the Sherman Act. Justice Douglas, writing in *Schwegmann*, could hardly have been more emphatic on this point. As we have seen, *Schwegmann* declared invalid a nonsigner provision in Louisiana which allowed, but did not compel, liquor distributors to impose minimum prices upon retailers at a time when Congress had not yet enacted laws allowing such provisions as an exception to the Sherman Act. Justice Douglas declared, "It is clear from our decisions under the Sherman Act [citations] that this interstate marketing arrangement would be illegal, that it would be enjoined, that it would draw civil and criminal penalties, and that no court would enforce it. Fixing minimum prices, like other types of price fixing, is illegal *per se*. [Citations.] Resale price maintenance was indeed struck down in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373. . . . The fact that a state authorizes the price fixing does not, of course, give immunity to the scheme, absent approval by Congress." (341 U.S. at p. 386 [95 L.Ed. at pp. 1043-1044].)

The department asserts, however, that the program involved here is not invalid because, unlike the circumstances in *Schwegmann*, a statute compels the imposition of minimum prices upon retailers, and, therefore the program is a sovereign act of the state exempt from the Sherman Act.

It is important to observe in this connection that the prices imposed upon the retailers are those determined in the sole discretion of the producers, and that the department does not participate in determining the minimum price, but only enforces the price set by the producers. Our



attention has not been called to any other comparable scheme in the country—in which the state polices by means of sanctions prices established by private interests—that has been judicially found exempt from the Sherman Act without the immunity provided by the Miller-Tydings Act and the McGuire Act.

We reject the assertion of the department and amicus curiae that the discretion of the producer in setting minimum prices is not absolute and that the department has the power to set a maximum price if the figure listed by the producer is unreasonable. They rely upon article XX, section 22, of the California Constitution, which sets forth the powers of the department regarding licensing the sale of alcoholic beverages and the provision in subdivision (f) of section 24755 which allows the department to grant “written permission . . . for good cause shown and for reasons not inconsistent” with the retail price maintenance law to sell below the price listed by the manufacturer.

There is nothing in either article XX, section 22, or in subdivision (f) of section 24755 which authorizes the department to set maximum prices for the purpose of promoting competition among liquor producers. In only one case has the department attempted to set a different price for distilled spirits than that posted by the producer—*Schenley Affiliated Brands Corp. v. Kirby* (1971) 21 Cal. App.3d 177, 186 [98 Cal.Rptr. 609]—and it was there held that the department did not have such authority. We have not been referred to any instance in which the department allowed a retailer to sell below the listed price “for good cause.” Since a primary goal of the price maintenance pro-

gram is asserted to be promotion of temperance, we seriously doubt that the setting of a maximum price by the department for the sole purpose of encouraging competition among producers would be consistent with the declared purpose of the program. Subdivision (f) appears to be directed to alleviating the hardship of an individual retailer who “for good cause” can show that he should be excepted from the minimum price requirement in a particular instance rather than authorizing the department to set maximum prices to enhance competition among producers.

On a number of occasions the United States Supreme Court has addressed the question whether the participation of a state in anticompetitive conduct is immunized from the Sherman Act. In *Parker v. Brown* (1943) 317 U.S. 341 [87 L.Ed. 315, 63 S.Ct. 307] and *Bates v. State Bar of Arizona* (1977) 433 U.S. 350 [53 L.Ed.2d 810, 97 S.Ct. 2691], the court held that the Sherman Act was not violated because the conduct involved was the sovereign act of the state which the Sherman Act did not prohibit. In *Cantor v. Detroit Edison Co.* (1976) 428 U.S. 579 [49 L.Ed.2d 1141, 96 S.Ct. 3110] and *Goldfarb v. Virginia State Bar* (1975) 421 U.S. 773 [44 L.Ed.2d 572, 95 S.Ct. 2004], a contrary conclusion was reached.

We proceed, then, to an analysis of these decisions to determine the principles which will exempt from the Sherman Act a price fixing program conducted under the auspices of the state.

*Parker v. Brown*, *supra*, 317 U.S. 341, the case in which the high court first enunciated the state action exemption, involved a California program designed to conserve the

agricultural resources of the state and to prevent economic waste in the marketing of raisins. Under that scheme, if a given number of producers in a particular area petitioned for the establishment of a marketing plan for raisins and a commission appointed by the Governor found that such a plan would enhance the state's objectives without permitting unreasonable profits to producers, the Director of Agriculture appointed a committee of producers to formulate a program, which was designed to compel producers to sell a certain proportion of their raisins at a price determined by the committee or producers. The commission was required to approve the program suggested by the committee, and had the power to modify it. If a certain number of producers in the area accepted the program, it became effective throughout the area.

In finding no violation of the Sherman Act, the court reasoned in part that the marketing plan was never intended to operate by force of individual agreement but derived its authority and efficacy from the legislative command of the state, and that the Sherman Act was not designed to restrain a state or its officers from activities directed by its Legislature. It was held that, because the state had created the machinery for establishing the program and had adopted and enforced it, acting through the commission, the restraints were imposed as an act of government which was not prohibited by the Sherman Act. It is the state "which adopts the program and which enforces it," the court emphasized. (317 U.S. at p. 352 [87 L.Ed. at p. 326].)

*Cantor v. Detroit Edison Co.*, *supra*, 428 U.S. 579, is significant not only because of its holding on the facts

involved there, but because of its analysis of the state action exemption laid down in *Parker*. In *Cantor*, the Detroit Edison Company, which was the sole distributor of electricity in southeastern Michigan, supplied consumers with almost 50 percent of standard-size light bulbs. The charge for the bulbs did not appear separately in the billing, but was included in the general charges for electricity. This billing system and the rates charged by Detroit Edison were both approved by the Michigan Public Service Commission and could not be altered without the commission's approval. Petitioner was a retail druggist who filed a complaint against the utility, alleging that it was using its monopoly power in the distribution of electricity to restrain competition in the sale of bulbs, in violation of the Sherman Act.

The Supreme Court held that the state action exemption did not shield the utility from a charge of violating the act because the light bulb program did not implement a statewide policy, which was neutral on the question whether the utility should have such a program, and that the decision to institute the program was made by the utility and was merely approved by the regulatory body.

The analysis in *Cantor* of the prior holding in *Parker* is of interest. After discussing the contentions at some length, the court pointed out that Chief Justice Stone in *Parker* "carefully selected language which plainly limited the Court's holding to official action *taken by state officials*." (Italics added; 428 U.S. at p. 591 [49 L.Ed.2d at p. 1150].) In a footnote, the court observed that Chief Justice Stone made 13 references in *Parker* to the fact that state action was involved and that "[e]ach time his language was care-

fully chosen to apply only to official action, as opposed to private action approved, supported, or even directed by the State . . . . [¶] The cumulative effect of these carefully drafted references unequivocally differentiates between official action on the one hand, and individual action (*even when commanded by the State*), on the other hand." (Italics added; *id.*, at p. 591, fn. 24 [49 L.Ed.2d at p. 1150].) Other passages in the *Cantor* opinion make it clear that *Parker* did not hold that the state action exemption applies to anticompetitive conduct which the state either approves or directs private parties to perform.<sup>7</sup>

*Goldfarb v. Virginia State Bar*, *supra*, 421 U.S. 773, considered state action under the Sherman Act in a different context. There, the question presented was whether adherence by attorneys to a fee schedule recommending minimum prices for common legal services published by a county bar association violated the act. Although membership in the association was voluntary, enforcement of the minimum fees was provided by the Virginia State Bar, the administrative agency through which the Virginia Supreme Court regulated the practice of law. The court held that this constituted a "classic illustration of price fixing" which was

<sup>7</sup>For example, the court declares that *Goldfarb* (discussed *infra*) cannot be read as a "guarantee that compliance with any state requirement would automatically confer federal antitrust immunity" (428 U.S. at p. 600 [49 L.Ed.2d at p. 1155]) and the opinion approves a caveat in *Parker* that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful" (428 U.S. at p. 602 [49 L.Ed.2d at p. 1156]).

We note that in a recent case involving the application of the state action exemption to a subdivision of the state, the United States Supreme Court distinguished *Cantor* on the ground that it involved anticompetitive activities of private parties. (*City of Lafayette v. Louisiana Power & Light Co.* (1978) 435 U.S. 389 [55 L.Ed.2d 364, 98 S.Ct. 1123].)

not immunized from the prohibitions of the Sherman Act. In distinguishing *Parker*, the *Goldfarb* court pointed out that the state did not compel the bar association to adopt minimum fees, whereas in *Parker* the program was required by the state, acting as sovereign.

The fourth and most recent case involving the state action exemption is *Bates v. State Bar of Arizona*, *supra*, 433 U.S. 350, in which it was held that a rule of the Arizona Supreme Court prohibiting attorneys from advertising was exempt from the Sherman Act. The court distinguished *Goldfarb* on the ground that there the anticompetitive activity was not required by the state, whereas, since the Arizona Supreme Court was the "ultimate body wielding the State's power over the practice of law" the restraint was "compelled by direction of the State acting as a sovereign." (433 U.S. at p. 360 [53 L.Ed.2d at p. 821].) *Cantor* was distinguished on several grounds: the claim in *Cantor* was directed against a private party; the state had no independent regulatory interest in the market in light bulbs, and the program was instigated by the utility, with only the acquiescence of the state regulatory commission. In *Bates*, by contrast, the Arizona Court which adopted the rules was the real party in interest, control over advertising by attorneys had long been the subject of the state's oversight, the rule prohibiting advertising reflected a clear articulation of state policy, and the Arizona State Bar acted as the agent of the court and under its direct supervision. Significantly, the court also relied upon the fact that the rule was "subject to pointed re-examination by the policy maker—the Arizona Supreme Court—in enforcement proceedings." Thus, it was held, the concern that federal policy



was being unnecessarily subordinated to state policy was reduced. It was deemed significant that state policy "is so clearly and affirmatively expressed and that the State's supervision is so active." (433 U.S. at p. 362 [53 L.Ed.2d at p. 822].) The high court nevertheless invalidated the Arizona rule on the ground that it violated the First Amendment because of overbreadth.

We attempt, then, to isolate the characteristics which will qualify a program or rule as a sovereign act of the state so as to exempt it from the Sherman Act. It is clear that no exemption applies if the anticompetitive act is performed by a private association and is not compelled by the state (*Goldfarb*) or if the state merely approves anticompetitive conduct initiated by a private agency and the program does not effectuate any statewide policy (*Cantor*). It does not follow, however, that conduct by private parties under compulsion of state law is necessarily immune from the Sherman Act even if such conduct is designed to carry out a policy of the state.

The heart of the issue is whether the sovereign act of the state which will immunize a price fixing law from the Sherman Act must be either the act of the state itself or one over which the state has the ultimate power of decision, or whether it is sufficient to invoke the exemption if, as in the program we here consider, the state compels private persons to engage in anticompetitive conduct and essentially exercises no control over the substance of their actions.

As mentioned above, we have discovered no decision which has gone so far as to hold that a program comparable

to that prescribed in section 24755 is exempt from the Sherman Act as being valid state action.

Neither *Parker* nor *Bates*, the two cases which found exemptions from the Sherman Act on the ground of state action, involved private conduct the substance of which was totally unconfined by state regulations. In *Parker*, although private persons had some voice in determining whether the prorate program should be instituted for a particular area, the final authority over the prices set in the program, as well as other details thereof was in the commission, a creature of the state, whose members were appointed by the Governor. In effect, the committee of producers which formulated the program and submitted it to a referendum merely had the right to recommend a program to the commission, which was required to approve the scheme and had the discretionary power to make modifications. *Cantor* could hardly have made it clearer that the *Parker* rule immunizes official action taken by state officers from the strictures of the Sherman Act, but that *Parker* did not decide private action condoned or directed by the state was exempt from the act. (Note, *Parker v. Brown Revisited: The State Action Doctrine After Goldfarb, Cantor, and Bates* (1977) 77 Colum.L.Rev. 898.)

In *Bates* the rule prohibiting advertising was a direct order of the state, acting through the Arizona Supreme Court. Even so, the court emphasized that the directive was subject to "pointed re-examination" by the Arizona court and its administration was actively supervised by the court so as to reduce the likelihood that federal antitrust policy would be unnecessarily subordinated to state policy.



In the price maintenance program before us, the state plays no role whatever in setting the retail prices. The prices are established by the producers according to their own economic interests, without regard to any actual or potential anticompetitive effect; the state's role is restricted to enforcing the prices specified by the producers. There is no control, or "pointed re-examination," by the state to insure that the policies of the Sherman Act are not "unnecessarily subordinated" to state policy. Thus, in our view, we would be extending the decisions of the United States Supreme Court beyond their intended design if we were to hold, as the department urges, that this scheme is immune from the Sherman Act.

The department asserts, however, that whatever congressional intent may have been with respect to exempting products other than liquor from the Sherman Act, the report of the Senate Judiciary Committee, which recommended repeal of the Miller-Tydings Act and the McGuire Act, made it clear that fair trade laws will not prohibit manufacturers of alcohol from enforcing resale prices in states which pass price fixing statutes pursuant to the Twenty-first Amendment.<sup>8</sup> This statement in the report

<sup>8</sup>The report states, "Liquor will not be affected by repeal of the fair trade laws in the same manner as other products because the Twenty-First Amendment to the Constitution gives the States broad powers over the sale of alcoholic beverages. Thus while repeal of the fair trade laws generally will prohibit manufacturers from enforcing resale prices, alcohol manufacturers may do such in States which pass price fixing statutes pursuant to the Twenty-First Amendment." (1975 U.S. Code, Cong. & Admin. News, at pp. 1569, 1571.)

represents only an opinion that the Twenty-first Amendment will allow continuation of price fixing for liquor in those states which properly allow such conduct—an issue which we discuss *infra*. We do not view this opinion as a declaration of antitrust policy. There is a "heavy presumption against implicit exemptions" to the Sherman Act (*Goldfarb, supra*, 421 U.S. 773, at p. 787 [44 L.Ed.2d 572, at p. 585]), and we conclude that the statement in the Senate report relied upon by the department does not allow us to read into the Sherman Act an exemption for liquor fair trade provisions which the act itself does not contain.

### III

We consider next the department's contention that we are bound by prior decisions of this court to hold that section 24755 is not in conflict with the Sherman Act. The department places primary reliance upon *Samson Market Co. v. Alcoholic Bev. etc. Appeals Bd., supra*, 71 Cal.2d 1215. In *Samson*, we were called upon to decide whether the change from the nonsigner method of controlling retail liquor prices to the present system of requiring the filing of minimum retail prices with the department violated the Sherman Act. We held that this change in the "mechanism" of fixing prices did not create a conflict with the Sherman Act. The department seizes upon this statement as a holding that section 24755 does not violate the Sherman Act as amended in 1975.

This contention is clearly without merit. The thrust of our holding in *Samson* was that the change in methodology did not amount to a difference in "substance and practical effect" so that our prior holding that the nonsigner provi-

sion did not unlawfully delegate legislative power to fix prices applied with equal force to the means now specified in section 24755. Moreover, *Samson* was decided in 1969, six years before the repeal of the McGuire Act. Thus, if we had addressed ourselves directly to the question, we would have been compelled to conclude that section 24755—the provisions of which are identical “in substance and practical effect” to the nonsigner provision then exempted from the antitrust laws—was not in conflict with the Sherman Act.<sup>9</sup>

Nor do *Wilke & Holzheiser, Inc. v. Dept. of Alcoholic Bev. Control*, *supra*, 65 Cal.2d 349, or *Allied Properties v. Dept. of Alcoholic Beverage Control*, *supra*, 53 Cal.2d 141, conflict with our conclusion that section 24755 violates the Sherman Act. Neither of those cases considered this issue; at the time they were decided fair trade laws involving liquor as well as other products were exempted from the antitrust laws by the Miller-Tydings Act and the McGuire Act.

<sup>9</sup>The exemptions under the Miller-Tydings Act and the McGuire Act covered contracts relating to products in free and open competition with commodities of the same general class produced by others. Section 24755 does not contain a requirement for a contract, nor the requirement that the liquor products to which the price posting provisions apply be in competition with one another. Based upon these differences, the department urges that the price posting program contained in section 24755 was not exempt from the Sherman Act, and therefore the statement in *Samson* that the section does not conflict with the Sherman Act is a direct holding on the issue now before us. We reject this assertion, for we held in *Samson* that the price posting program in section 24755 was in substance and effect identical to the nonsigner provision in the pre-1961 version of the section. Thus, the absence of a fair trade contract was deemed to be of no significance. Moreover, it had been held that free and open competition among the alcoholic beverages to which the section applies may be presumed. (*Reimel v. Alcoholic Bev. etc. Appeals Bd.* (1967) 256 Cal.App.2d 158, 173-174 [64 Cal.Rptr. 26].)

## IV

(3a) We must next consider whether the Twenty-first Amendment permits California to fix resale prices of distilled spirits in spite of the Sherman Act. As we have seen, section 2 of the amendment provides, “The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.” The department contends this provision insulates price fixing of liquor authorized by a state from the prohibitions of the Sherman Act.

The board rejected this contention. It relied upon decisions holding the Twenty-first Amendment had not *pro tanto* repealed the commerce clause and which emphasized that the policies of each must be considered when they conflict. The board found the state’s fair trade laws ill-suited to perform their intended function, and consequently found that California’s interest in continued operation of those laws was outweighed by the firm federal policy prohibiting price fixing, which would be frustrated if the fair trade statutes were upheld. Consequently, it tipped the balance in favor of the commerce-clause-based Sherman Act, and against the state regulations. The department contests the conclusion and the process by which it was reached by the board.

(4) It is axiomatic that consideration of any state regulation of intoxicating beverages must begin with the Twenty-first Amendment. Yet it is equally clear the inquiry does not terminate at that point. After *Hostetter v. Idlewild Liquor Corp.* (1964) 377 U.S. 324 [12 L.Ed.2d 350,

84 S.Ct. 1293], and *Sail'er Inn, Inc. v. Kirby*, *supra*, 5 Cal. 3d 1, it is settled that states do not have plenary powers over all matters relating to alcoholic beverages. When a statute enacted pursuant to the Twenty-first Amendment conflicts with an enactment based on the commerce clause, we must balance the policies furthered by each in order to determine which should prevail.

*Hostetter* was the first explicit articulation of the need to consider the commerce clause and the constitutional amendment in juxtaposition. In *Hostetter* a liquor retailer sold alcohol only to international airline passengers for use at their foreign destinations. It was claimed New York could not impose a state liquor license requirement upon the retailer because of the commerce clause. The Supreme Court agreed with this contention and rejected the state's claim of absolute power under the Twenty-first Amendment to regulate the passage of liquor through its territory.

The court summarized the line of cases commencing with *State Board v. Young's Market Co.* (1936) 299 U.S. 59 [81 L.Ed. 38, 57 S.Ct. 77], which declared that states were "totally unconfined" by traditional commerce clause limitations in restricting the importation of intoxicants. After reviewing *Young's Market* and its progeny, the court noted, "To draw a conclusion from this line of decisions that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification. If the Commerce Clause had been *pro tanto* 'repealed,' then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating

liquor. Such a conclusion would be patently bizarre and is demonstrably incorrect. . . . [¶] Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." (*Id.*, at pp. 331-332 [12 L.Ed.2d at p. 356].)

In *Sail'er Inn, Inc. v. Kirby*, *supra*, 5 Cal.3d 1, we emphasized in even stronger terms the necessity of accommodating the policy of the Twenty-first Amendment to other fundamental policies. There, a state statute precluding the employment of women as bartenders was challenged under article XX, section 18, of the California Constitution, the federal Civil Rights Act, and the equal protection clauses of the state and federal Constitutions. First, we held the statute violative of article XX, section 18, which prohibits disqualification for any vocation on account of sex.<sup>10</sup> Next, we found the statute also violated the nondiscriminatory hiring provisions of the Civil Rights Act, flatly rejecting the claim that the Twenty-first Amendment precludes federal interference with state regulation of alcohol. Refusing to accept the facile interpretation of the amendment which was offered by the state, we noted, "Although some early cases painted state powers under section 2 of the Twenty-first Amendment with a broad brush, later decisions have taken a position more in keeping with the original intent of the amendment. . . . [¶] Thus it is apparent that the Twenty-first Amendment not only does not reach all alcoholic beverage cases which would otherwise fall within

<sup>10</sup>This provision was amended in 1974 and renumbered section 8 of article I.



Congress' commerce clause powers, but even in those situations covered by the express language of the amendment, *some balancing and accommodation must take place.*" (*Id.* at p. 12; italics added.)

The department attempts to overcome the explicit adoption by *Hostetter and Sail'er Inn* of a balancing approach by raising several contentions. First, it focuses on *Seagram & Sons v. Hostetter* (1966) 384 U.S. 35 [16 L.Ed.2d 336, 86 S.Ct. 1254]. That case presented a challenge to a New York statute which was designed to eliminate the lingering effects of an earlier liquor resale price maintenance scheme. The statute required liquor wholesalers and retailers to affirm to the liquor authority of the state that their New York prices were no higher than prices at which similar liquor was sold anywhere in the United States during the preceding month. The court upheld the statute against challenges based upon the due process, equal protection and commerce clauses.

The department contends *Seagram & Sons* distinguished *Hostetter* as a case in which state regulation was struck down because it was regulating liquor not destined for use in the state. According to the department, state power to regulate intoxicants which will be used in the state remains virtually unconditional.

We do not read *Seagram & Sons* as stating such a broad rule. While the court did make a distinction between the case there under consideration and *Hostetter* on the ground that the latter involved regulation of liquor for use outside the state, whereas the rule considered in *Seagram & Sons* related to liquor to be consumed within the regulating state,

the distinction was made for the purpose of determining whether the regulation placed an unconstitutional burden on interstate commerce. (384 U.S. at p. 45 [16 L.Ed.2d at p. 344].) After concluding that no such burden was established, the court went on to determine whether, under the supremacy clause, there was a conflict between the state's price regulation and the Sherman Act and other federal antitrust statutes. If, as the department contends, state regulation of liquor to be used within the state is immune from attack because the Twenty-first Amendment affords states plenary powers over liquor consumed within their borders, free of the restrictions imposed by the Sherman Act, there would have been no necessity for the court to discuss the merits of the antitrust claims.

Indeed, the court in *Seagram & Sons* acknowledged that the Twenty-first Amendment does not insulate state regulations which apply only to liquor consumed within a state from federal antitrust statutes, for it recognized that there was a potential conflict between the regulation involved there and federal law. (384 U.S. at p. 46 [16 L.Ed.2d at pp. 344-345].)<sup>11</sup>

Moreover, the distinction advanced by the department fails to take into account our decision in *Sail'er Inn*, which

<sup>11</sup>The department's views as to the reach of the Twenty-first Amendment are supported by *National Railroad Passenger Corporation v. Miller* (D.Kan. 1973) 358 F.Supp. 1321, and by dictum in *Washington Brewers Institute v. United States* (9th Cir. 1943) 137 F.2d 964, decided a number of years before *Hostetter*. Although the department attempts to distinguish *Schwegmann* on the ground that it involved an interstate marketing scheme, for the reasons stated above, we do not view that distinction as persuasive.

makes clear that state regulation of alcoholic beverages to be used within the state is still subject to a commerce clause enactment in certain circumstances.

The department also attempts to evade *Sail'er Inn*. It contends the decision turned primarily on our own constitutional provision, and in any event, is inapposite because the California statute regulated employment, not liquor. Neither distinction undercuts the central thrust of *Sail'er Inn*. While we could have grounded our decision solely on the California Constitution, we did not. We expressly considered the federal Civil Rights Act and gave detailed attention to whether it was negated by the Twenty-first Amendment. Nothing said detracts from its holding that a balancing process is required in deciding whether a state's power over liquor is plenary.

Next, the department relies upon *California v. LaRue* (1972) 409 U.S. 109 [34 L.Ed.2d 342, 93 S.Ct. 390]. In *LaRue* bar owners challenged the constitutionality of regulations of the department limiting the type of entertainment which could be presented in taverns holding liquor licenses. The regulations were upheld; the court found the Twenty-first Amendment gave them an added presumption of validity. *LaRue* did not, however, cast doubt on the need to accommodate and balance. The decision must be explained as a case in which the balance was struck in favor of the state regulation. Nowhere does *LaRue* state that the "added presumption" obviates the need to balance federal policy against a state's interest, or the Twenty-first Amendment against the commerce clause.

The most recent discussion of the Twenty-first Amendment reaffirms that the amendment does not except all state laws involving liquor from every commerce clause enactment. In *Craig v. Boren* (1976) 429 U.S. 190 [50 L.Ed.2d 397, 97 S.Ct. 451], an Oklahoma statute specifying different drinking ages for men and women was declared unconstitutional under the equal protection clause. The interest of the state in controlling liquor under the Twenty-first Amendment was held insufficient to overcome a challenge to the statute. The court stated, "[t]he Amendment primarily created an exception to the normal operation of the Commerce Clause. [Citations.] Even here, the Twenty-first Amendment does not *pro tanto* repeal the Commerce Clause, but merely requires that each provision 'be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case.'" (*Id.*, at p. 206 [50 L.Ed.2d at p. 412].)<sup>12</sup>

## V

(3b) Therefore, we must undertake a balancing process in the present case. We must ascertain what policies are furthered by the state's system of permitting producers to fix retail prices, whether the retail price maintenance provisions clearly vindicate those policies, and whether and to what degree the policy underlying the Sherman Act is undermined by the state's program.

<sup>12</sup>It is beyond dispute that the Twenty-first Amendment does not permit states to enact liquor laws in disregard of the due process or equal protection clauses. *Wisconsin v. Constantineau* (1971) 400 U.S. 433 [27 L.Ed.2d 515, 91 S.Ct. 507], held a state law authorizing the "posting" of the names of excessive drinkers was not exempt from compliance with due process requirements. *Craig v. Boren, supra*, reaches the same result under the equal protection clause.

The purposes of the liquor price maintenance law are to promote temperance and orderly marketing conditions.<sup>13</sup> In *Allied Properties v. Dept. of Alcoholic Beverage Control*, *supra*, 53 Cal.2d 141, and *Wilke & Holzheiser, Inc. v. Dept. of Alcoholic Bev. Control*, *supra*, 53 Cal.2d 141, and *Wilke & Holzheiser, Inc. v. Dept. of Alcoholic Bev. Control*, *supra*, 65 Cal.2d 349, we upheld the constitutionality of these laws against the challenge that they constituted an improper exercise of the police power. In making our determination, we were guided by the settled rule applicable to a claim that a statute exceeds the police power: "In passing upon the fair trade provisions we must be guided by the well-settled principles that the presumption is in favor of constitutionality and that the validity of an act of the Legislature must be clear before the statute can be declared unconstitutional. It is not our province to weigh

<sup>13</sup>Section 23001 provides: "This division is an exercise of the police powers of the State for the protection of the safety, welfare, health, peace, and morals of the people of the State, to eliminate the evils of unlicensed and unlawful manufacture, selling, and disposing of alcoholic beverages, and to promote temperance in the use and consumption of alcoholic beverages. It is hereby declared that the subject matter of this division involves in the highest degree the economic, social, and moral well-being and the safety of the State and of all its people. All provisions of this division shall be literally construed for the accomplishment of these purposes."

Section 24749 provides: "It is the declared policy of the State that it is necessary to regulate and control the manufacture, sale, and distribution of alcoholic beverages within this State for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to the law. In order to eliminate price wars which unduly stimulate the sale and consumption of alcoholic beverages and disrupt the orderly sale and distribution thereof, it is hereby declared as the policy of this State that the sale of alcoholic beverages should be subjected to certain restrictions and regulations. The necessity for the enactment of provisions of this chapter is, therefore, declared as a matter of legislative determination."

the desirability of the social or economic policy underlying the statute or to question its wisdom; they are purely legislative matters. [¶] Where, as here, it is argued that a statute does not constitute a proper exercise of the police power, the inquiry of the court is limited to determining whether the object of the statute is one for which that power may legitimately be invoked and, if so, whether the statute bears a reasonable and substantial relation to the objects sought to be attained . . . [¶] The means provided in a statute must be accepted as being reasonably designed to accomplish its objective unless it is unquestionable that they are improper." (53 Cal.2d 141, 146, 148.)

Applying this standard, we determined that the Legislature's objectives were valid and that the means employed were not patently improper. We held that the Legislature could rationally conclude that the public would be adequately protected against excessive prices by the ordinary play of competition among manufacturers, that the elimination of price cutting on the retail level would promote temperance, and that competition among the relatively few producers and wholesalers would not result in disorderly marketing conditions. Moreover, the provisions did not unlawfully delegate legislative power because, although producers of liquor, like manufacturers under the general fair trade law, set prices in accordance with their own economic interests, they indirectly carried out the purposes of the Legislature. We observed in *Allied Properties* that most courts which had considered the issue had upheld the constitutionality of liquor fair trade laws.

In *Wilke & Holzheiser* we reconsidered our decision in *Allied Properties* in the face of a challenge based upon the



circumstance that since 1959, when the latter was decided, a majority of states had held mandatory price maintenance provisions, nonsigner provisions or fair trade laws to be unconstitutional. We again emphasized that the Legislature's assumption that the price maintenance provisions would promote temperance and orderly marketing conditions were not unquestionably "arbitrary and beyond rational doubt erroneous" (65 Cal.2d at p. 361), and we reaffirmed our holding in *Allied Properties*.

In the present case, we are engaged in a different exercise. The connection between the means employed by the Legislature and the ends sought to be attained is not clothed with the same presumptions applied in considering an assertion that the state has exceeded its police power. Rather, as *Hostetter* and *Sail'er Inn* command, we must balance California's interest in promoting temperance and orderly marketing conditions by the method set forth in section 24755 against the policy underlying the Sherman Act.

That policy was cogently described by Justice Black in *Northern P. R. Co. v. United States* (1958) 356 U.S. 1, 4-5 [2 L.Ed.2d 545, 549, 78 S.Ct. 514]: "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the

policy unequivocally laid down by the Act is competition. . . ."

(5) In the vindication of this policy any combination which tampers with the price structure is unlawful. Although the participants in a price fixing scheme may be in no position to control the market, to the extent that they raise, lower or stabilize prices they violate the act, and this is so even if the prices fixed are reasonable. (*U.S. v. Socony-Vacuum Oil Co.* (1940) 310 U.S. 150, 221-223 [84 L.Ed. 1129, 1167-1168, 60 S.Ct. 811]; *U.S. v. Trenton Potteries* (1927) 273 U.S. 392, 397 [71 L.Ed. 700, 705, 47 S.Ct. 377, 50 A.L.R. 989].)

It is well established that resale price fixing is illegal under the Sherman Act (*Schwegmann*) and we have concluded above that such conduct is not exempt from the act because it is performed under the compulsion of state law. The imposition of a retail price by a producer is a clear violation of federal law absent such an exemption.

The provision we here consider has the effect not only of allowing illegal vertical restraints on competition—i.e., resale prices specified by producers and imposed upon retailers—but horizontal restraints as well. Corsetti argued before the board, as he does in this court, that section 24755 is an "open invitation to price-fixing" among producers and that there is in fact no meaningful price competition among nationally advertised brands of liquor in California. The board agreed with this assertion.

Corsetti offers the following evidence: In July 1976, five leading brands of gin cost \$4.89 for a fifth of a gallon,<sup>14</sup> and in July 1976, three of the five best selling brands of bourbon whiskey cost \$5.49 a fifth, and the fourth cost 1 cent more.<sup>15</sup> Five leading brands of scotch whiskey sold for \$8.39 or \$8.40 a fifth in July 1976.<sup>16</sup> Between July 1971 and July 1976 the prices for the most popular brand of scotch (J&B) and the fourth leading scotch (Johnny Walker Red Label) were identical; a rise in the price of one was followed by a precise price rise in the other within the same month.<sup>17</sup> Moreover, as indicated in the margin, the price differential between leading brands of distilled liquor has gradually decreased since 1955 so that, for example, while there was a 50-cent difference between two of

<sup>14</sup> Brand	July 1955	July 1961	July 1966	July 1971	July 1976
Gordon's	4.25	4.29	4.29	4.69	4.89
Gilbey's	4.09	4.19	4.24	4.59	4.89
Seagram's	4.39	4.39	4.39	4.65	4.89
Burton's	3.89	3.99	3.99	3.99	4.89
Schenley	4.09	4.19	4.19	4.29	4.89

<sup>15</sup>In 1975 four of the five best selling bourbons in the United States were Jim Beam, Early Times, Old Crow and Ancient Age. The first three were posted at \$5.49 a fifth in July 1976, and the last, Ancient Age, cost one cent more.

<sup>16</sup> Brand	July 1961	July 1966	July 1971	July 1976
Whitehorse	6.59	7.05	7.50	8.40
Haig & Haig	6.69	7.07	6.49	8.39
Vat 69	6.55	6.99	7.50	8.39
J & B	7.25	7.25	7.60	8.40
J. Walker Red	6.55	7.05	7.60	8.40

<sup>17</sup>In July 1961, a fifth of J&B cost \$7.25, while a fifth of Johnny Walker Red cost \$6.55. Five years later, J&B was still at \$7.25 and Johnny Walker Red had risen to \$7.05. By July 1971, the two had reached an identical price of \$7.60 a fifth. In April 1972, both raised the price to \$7.80 a fifth, where it remained until May 1974, when both raised their prices to \$8.40 a fifth, and there it remained as of July 1976.

the five leading brands of gin in July 1955, the price of all five was exactly the same by July 1976, and although there was a 70-cent price difference between two of the five leading brands of scotch in July 1961, that difference was only 1 cent by July 1976.<sup>18</sup>

It was apparently on the basis of such evidence that a California Senate committee stated, in a report relied upon by the board, that the retail price maintenance system in California "has resulted in the elimination of any semblance of competition within the industry." (Sen. Select Com. Rep. on Laws Relating to Alcoholic Beverages (1974) vol. 1, p. 9.) The committee also concluded that because of the program, "the consumer pays about the highest retail prices for liquor, beer and wine in the country, although the state levies one of the lowest excise taxes on these beverages." (*Id.*, at pp. 82-83).

It is urged that these statistics present an inaccurate picture because there are in fact wide differences in prices among liquors of the same type. In support of this assertion, figures are cited which indicate that there is a substantial difference in price between some brands of liquor of the same type,<sup>19</sup> and that there is a marked price

<sup>18</sup>The department and amicus curiae insist that we may not rely upon the figures proffered by Corsetti because they were not presented to the department. However, the information was derived from the price postings filed with the department pursuant to section 24755 and department rules. They were relied upon by the board, and we may take judicial notice of them. (Evid. Code, §§ 452, subd. (h), 459.)

<sup>19</sup>In April 1977 Lord Douglas scotch sold for \$5.49 a quart, whereas Chivas Regal cost \$15.79; Czarina Vodka was listed at \$4.49 a quart and Smirnoff at \$7.40; and the price for a quart of gin ranged from \$3.81 for Smolka to \$9.28 for Beefeater's.

differential between some roughly equivalent brands.<sup>20</sup> However, that there may be some interbrand competition does not detract from the circumstance that among leading brands there is a uniformity of price which persuasively demonstrates the absence of "free and unfettered competition" in the California liquor industry. Indeed, the posting system facilitates price fixing among producers. While it may be a per se violation of the Sherman Act for competitors to exchange price information on a regular basis (*United States v. Container Corp.* (1969) 393 U.S. 333, 336-337 [21 L.Ed.2d 526, 529-530, 39 S.Ct. 510]), producers may readily determine the prices charged by their competitors by referring to the prices filed with the department or to industry publications listing the posted prices. (Cal. Admin. Code, tit. 4, § 99.2, subd. (b)(2).)

In our view, the price maintenance provisions embodied in section 24755 clearly violate the policy underlying the Sherman Act.

On the other side of the balance, the price maintenance provisions are designed, as we have seen, to promote temperance and orderly marketing conditions. The promotion of orderly marketing conditions, i.e., preventing bargain sales, price cutting and similar selling practices on the retail level, has two aspects—to reduce excessive consumption, thereby encouraging temperance, and to protect small licensees from predatory pricing policies of large retailers.

<sup>20</sup>Johnny Walker Red Label scotch sold for \$14.50 a quart while J&B Rare Scotch was \$10.60 a quart; Smirnoff and Wolfschmidt Vodka sold for \$7.40 and \$6.50 a quart respectively, and Kessler brand blended whiskey was listed at \$6.19 a quart whereas Seagram 7 Crown sold for \$5.99.

The board rejected the argument that fair trade laws were necessary to the economic survival of small retailers, relying upon studies described in the report of the Senate Judiciary Committee which recommended repeal of the Miller-Tydings Act and the McGuire Act. These studies revealed that the absence of fair trade laws had not injured small retailers: states with fair trade laws had a 55 percent higher rate of firm failures than free trade states, and the rate of growth of small retail stores in free trade states between 1956 and 1972 was 32 percent higher than in states with fair trade laws.<sup>21</sup> (1975 Code Cong. & Admin. News, *op. cit.*, p. 1571.)

Amicus curiae asserts that because package liquor stores and small grocery stores rely upon liquor sales for their economic existence, any tampering with the fair trade laws

<sup>21</sup>The report declares in part, "No evidence was presented to indicate that there were destructive predatory practices in states which had repealed fair trade laws. Nor were there bad effects in Canada which repealed its fair trade laws in 1957 or in Great Britain which repealed such laws in 1965. A study published in 1969 reports small retailers were not driven out of business and predatory price cutting was rare in the four years following repeal in Great Britain. Similar experiences have been reported in Canada.

"Moreover, statistics gathered by the Library of Congress indicate that the absence of fair trade has not harmed small business. Using Dun and Bradstreet data, the Library of Congress found the 1972 firm failure rate in 'fair trade' states which have the nonsigner provision was 35.9 failures per 10,000 firms, in 'fair trade' states without the nonsigner provision the rate was 32.2 failures per 10,000 firms, while the failure rate in free trade States averaged 23.3 failures per 10,000 firms—in other words, 'fair trade' States with fully effective laws have a 55 percent higher rate of firm failures than free trade States.

"Finally, the traditional argument that fair trade protects the 'mom and pop' store from unfair competition is not borne out by the statistics. Between 1956 and 1972 the rate of growth of small retail stores in free trade states (including states which repealed 'fair trade' during this period) is 32 percent higher than the rate in 'fair trade' states."



will have drastic consequences,<sup>22</sup> that New York experienced severe economic dislocation in the liquor industry after it repealed its fair trade laws,<sup>23</sup> that monopoly at the retail level will be increased without fair trade,<sup>24</sup> and that consumers will ultimately suffer because they will have a smaller number of liquor brands to select.

These arguments are aimed largely at protecting the economic interests of small retailers. They were considered and rejected by Congress when it determined in the Consumer Goods Pricing Act of 1975 to prohibit the states from enacting fair trade laws. While it is true that the liquor industry is heavily regulated and, therefore, competition in the industry may be inhibited to a greater extent than in other enterprises, this factor does not justify the continuation of fair trade laws which eliminate price competition among retailers.

The second and the major declared purpose for retail price maintenance of liquor is to promote temperance. The

<sup>22</sup>Amicus relies upon a 1974 report of the Department of Finance, entitled *Alcohol and the State: A Reappraisal of California's Alcohol Control Policies*. This report, while critical of fair trade laws, states that economic dislocation would result from abrupt changes in those laws, and recommends a gradual 10-year modification, with termination occurring only after the economic consequences are examined.

<sup>23</sup>In this connection, amicus cites a 1971 report of the New York Senate Excise Committee which found price cutting, lack of normal competition, and other evils in the liquor industry after repeal of the fair trade laws.

<sup>24</sup>It is asserted that the larger chain operations would sell at or below cost on a short term basis, thereby driving small independent retailers out of business, and once small retailers had been eliminated, a monopoly would exist and prices would stabilize as high as the market could bear. This overlooks the prohibition against loss leader sales contained in Business and Professions Code section 17044, and other proscriptions against unfair business practices.

board determined that these provisions do not promote temperance, relying upon a report of the Moreland Commission in New York, cited in *Seagram & Sons, Inc. v. Hostetter*, *supra*, 384 35, 39 [16 L.Ed.2d 336, 340]. According to that report, "compulsory resale price maintenance had had 'no significant effect upon the consumption of alcoholic beverages, upon temperance or upon the incidence of social problems related to alcohol.'"

A 1974 study referred to above found that per capita consumption of distilled spirits in California had increased by 42 percent between 1950 and 1972, and it concluded that "There is little compelling evidence to suggest that . . . fair trade . . . promote[s] temperance or contribute[s] in any significant way to the minimization of the current problem of alcohol abuse." (*Alcohol and the State: A reappraisal of California's Alcohol Control Policies*, *op. cit.*, pp. xi, 15.) Other authorities reach similar conclusions. (See, e.g., Sen. Select Com. Rep. on Laws Relating to Alcoholic Beverages, *op. cit.*, vol. 3, p. 69; Dunsford, *State Monopoly and Price-Fixing in Retail Liquor Distribution*, 1962 Wis.L.Rev. 454, 483.)<sup>25</sup>

Thus, while we concluded in *Attorney Properties* and *Wilke & Holzheizer* on the basis of presumptions regarding the validity of the Legislature's exercise of the police power

<sup>25</sup>A witness before the Senate committee stated that when New Mexico repealed its liquor fair trade law, consumption at first rose slightly, and then declined to a point lower than it had been while fair trade laws were in effect.

Dunsford states, "What evidence is available on the experience since 1934 casts doubt on whether the monopoly or price-fixing systems of control have any substantial temperance advantage in dealing with the unquestioned social risks of intoxicating liquors." (1962 Wis.L.Rev. at p. 483).

that we could not hold the connection between retail price maintenance and temperance was unquestionably "arbitrary and beyond rational doubt erroneous" the studies referred to above at the very least raise a doubt regarding the justification for such laws on the ground that they promote temperance.

Another factor in the balancing process is that fair trade laws generally are now contrary to public policy. This is demonstrated by Congress' reinstatement of the Sherman Act prohibitions, by the repeal in California of fair trade laws for products other than liquor (Stats. 1975, ch. 402, p. 878), as well as the recent modification of price maintenance provisions relating to the sale of milk (Stats, 1977, ch. 1192, [No. 5 Deering's Adv. Legis. Service] p. 118). Indeed, Corsetti points out that only two states, Massachusetts and Connecticut, currently retain mandatory retail price posting relating to liquor. Every state would appear to have an interest in the temperance of its inhabitants; the implication is clear, therefore, that resale price maintenance has not been found to be critical to achieve this goal in the vast majority of jurisdictions.

Finally, we find persuasive the argument that there are other means to achieve the fundamental goals of the price maintenance laws without running afoul of the Sherman Act. Thus, our laws prohibit the sale of any product as a "loss leader" (Bus. & Prof. Code, § 17044) and licensees may not offer any gift or premium in connection with the sale of alcohol (§ 25600). Other suggestions to carry out the policy of promoting temperance and orderly marketing conditions have been advanced. (See, e.g., Alcohol and the

State: A Reappraisal of California's Alcohol Control Policies, *op. cit.*, p. 15.)

(3c) In sum, we find that the policies underlying the Sherman Act are clearly violated by the liquor price maintenance laws, and that on the other side of the balance there is doubt whether such laws promote temperance, there is a clear national trend against fair trade laws, and there exist means other than mandatory price fixing to achieve the ends which those laws seek to attain. We conclude, therefore, that the policies underlying the Sherman Act must prevail, and that the price maintenance provisions embodied in section 24755 are invalid.

In view of this conclusion, we need not decide whether, as the board determined, section 24755 also violates equal protection of the laws.

## VI

The order of the board in *Rice v. Alcoholic Beverage Control Appeals Board* is affirmed. The writ of review filed by *Young's Market* is discharged and that petition is dismissed.

Tobriner, Acting C. J., Clark, Richardson, J., Newman, J., Taylor, J.,\* and Racanelli, J.,\* concurred.

Petitioner's application for a rehearing in No. 23631 was denied June 29, 1978. Bird, C. J., and Manuel, J., did not participate therein.

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\*Assigned by the Chairperson of the Judicial Council.

**Appendix D**

In the Court of Appeal  
of the  
State of California  
First Appellate District  
Division Two  
1 Civil No. 44862

Capiscean Corporation,	Petitioner,
vs.	
Alcoholic Beverage Control Appeals Board,	Respondent;
Department of Alcoholic Beverage Control,	Real Party in Interest.

[Filed Jan. 2, 1979]

**OPINION**

ROUSE, J.—In this extraordinary writ proceeding, authorized by section 23090 of the Business and Professions Code,<sup>1</sup> we consider the validity of fair trade laws regulating the sale of wine in this state, in light of the ruling in *Rice v. Alcoholic Bev. etc. Appeals Bd.* (1978) 21 Cal.3d 431

<sup>1</sup>Unless otherwise indicated, all statutory references are to the Business and Professions Code.



[146 Cal.Rptr. 585, 579 P.2d 476], which invalidated California's price maintenance laws relating to distilled spirits. The matter arose as follows:

On November 22, 1976, petitioner, holder of an off-sale general alcoholic beverage license issued by the Department of Alcoholic Beverage Control (hereafter Department) sold a quart of Old Crow whiskey to an employee of the Department for \$1.63 less than the minimum price and a magnum of Cresta Blanca wine for 92 cents less than the posted price. On November 30, 1976, petitioner sold another bottle of Old Crow whiskey to the same employee for \$1.63 less than the minimum price. After notice and hearing, the Department found that petitioner had violated section 24755 and title 4, section 99, subdivision (a), of the California Administrative Code in the sale of distilled spirits, and section 24862 and title 4, section 101, subdivision (a) in the sale of wine. The Department ordered petitioner's license suspended for 10 days on each of the three counts, the penalties to be served concurrently. On appeal to the Alcoholic Beverage Control Appeals Board (hereafter Board), the Board, following *Rice*, reversed the decision of the Department with respect to the counts alleging sale of distilled spirits below the minimum price, but affirmed the decision of the Department with respect to the count alleging sale of wine below the posted price. The Board believed itself prohibited from declaring the wine price maintenance provisions invalid by reason of article III, section 3.5 of the California Constitution.<sup>2</sup> (1) Petitioner

<sup>2</sup>Article III, section 3.5 of the California Constitution, approved by the people at the primary election held June 6, 1978, provides: "An administrative agency, including an administrative agency

seeks annulment of that portion of the Board's order affirming the decision of the Department, contending that the ruling in *Rice, supra* (21 Cal.3d 431) should be extended to invalidate wine price maintenance provisions as well.

We have compared the statutes and regulations relating to price maintenance of distilled spirits invalidated in *Rice* with the statutes and regulations relating to price maintenance of wine challenged in this proceeding, and find no significant differences. Although the statute invalidated in *Rice* (§ 24755) is more comprehensive than the statute challenged in this proceeding (§ 24862),<sup>3</sup> section 24862, construed in conjunction with the other sections contained in

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created by the Constitution or an initiative statute, has no power: [¶] (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional; [¶] (b) To declare a statute unconstitutional; [¶] (c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations."

<sup>3</sup>Section 24862: "No licensee shall in this state sell or resell to a retailer, and no retailer shall in this state buy any item of wine except at the selling or resale price thereof contained either in an effective price schedule or in an effective fair trade contract as authorized by Chapter 10 of this division [commencing with Section 24749], unless otherwise provided in this chapter.

"No licensee in this state shall sell or resell to a consumer any item of wine at less than the selling or resale price thereof contained either in an effective price schedule or in an effective fair trade contract as authorized by Chapter 10 (commencing with Section 24749) of this division unless otherwise provided in this chapter.

"Wine sold pursuant to a bona fide order accepted on the last business day of any month may be delivered to the purchaser, at the price in effect during said month, within two business days immediately following the last day of the month in which the sale was made."

chapter 11 (§ 24866 et seq.),<sup>4</sup> accomplishes the same end. Section 24866, for example, requires winegrowers, wholesalers licensed to sell wine, wine rectifiers and rectifiers to post schedules of selling prices of wine, make and file fair trade contracts and file schedules of resale prices. Section 24862 prohibits an off-sale retail licensee from selling at less than that prescribed price.

We agree with petitioner that the wine price maintenance provisions of section 24862 and related statutes differ from the price maintenance provisions relating to distilled spirits only in the type of beverage and the precise language of the respective sections, and that the impact of the restrictions is identical. As respondent Board acknowledges, the arguments in favor of retail price maintenance rejected by the California Supreme Court in *Rice, supra* (21 Cal.3d 431) cannot be accepted here. We conclude that the wine price maintenance provisions cannot be distinguished from the price maintenance provisions invalidated in *Rice* and, for the reasons stated in *Rice*, must also fall.

That portion of the Board's order affirming the decision of the Department with respect to alleged violations of the wine price maintenance schedule (count two) is annulled. The Board is directed to enter its order reversing the decision of the Department with respect to count two.

Taylor, P. J., and Kane, J., concurred.

<sup>4</sup>Section 24866: "Each wine grower, wholesaler licensed to sell wine, wine rectifier, and rectifier shall:

"(a) Post a schedule of selling prices of wine to retailers or consumers for which his resale price is not governed by a fair trade contract made by the person who owns or controls the brand.

"(b) Make and file a fair trade contract and file a schedule of resale prices, if he owns or controls a brand of wine resold to retailers or consumers."

## Appendix E

### Before the Alcoholic Beverage Control Appeals Board of the State of California

In the Matter of Accusation

Against

Anthony C. Ferrigno  
dba Consumers Distributing  
1350 - 17th Street  
San Francisco, CA 94107

Beer and Wine Importer,  
Beer and Wine Wholesaler,  
Off-sale Beer and Wine licenses

Respondent and Licensee

Under the Alcohol Beverage  
Control Act.

AB-4637

File 3221; Reg. 9534

Date and Place  
of Hearing:  
March 8, 1979  
350 McAllister Street  
San Francisco, CA

For Dept.:  
Honorable  
George Deukmejian  
Attorney General

Matthew Boyle,  
Deputy Attorney General

For Appel:  
James Reilly, Attorney

[Filed May 31, 1979]

Appellant has appealed a decision of the department of Alcoholic Beverage Control which determined that cause for disciplinary action exists pursuant to Article XX, section 22 of the California Constitution and Business and Professions Code section 24200(a) as to each of Counts I through V; that additional cause for disciplinary action exists pursuant to Business and Professions Code section 24200(b) in that appellant has violated or has permitted violation of section 25000 of that code and section 105(b), Title IV, California Administrative Code as to Count I, section 25000.5 of the Business and Professions Code as to Counts II and III, section 25004 that code as to Count IV, and sections 23355 and 24040 of that code as to Count V. As a penalty, it was ordered that appellant's license be

suspended separately and severally, for ten days each on Counts I through V, inclusive; provided, however, that the suspensions shall run concurrently for a total suspension of ten days.

The department's decision further provides:

#### "FINDINGS OF FACT:

##### "COUNT I

"It was stipulated as true that respondent did sell malt beverages, more fully described in Exhibit "A", attached hereto and made part hereof as if fully set forth, to licensed retailers in counties, for which a Malt Beverage Schedule was not filed or posted with the Department.

##### "COUNT II

"It was stipulated as true that on or about the dates set forth below, the respondent wholesale licensee sold Carlsberg Malt Liquor to a retail licensee in Butte County, without having a territorial agreement with the manufacturer for Butte County.

<u>"Retail Licensee</u>	<u>Date of Invoice</u>	<u>Invoice No.</u>
Villa Gourmet, Chico	August 3, 1977	25154
Villa Gourmet, Chico	July 21, 1977	13820

##### "COUNT III

"It was stipulated as true that on or about the dates set forth below, the respondent wholesale licensee sold McEwan's Tartan Ale and Leopard Lager to a retail licensee in Santa Cruz County, without having a territorial contract agreement filed with the manufacturer for Santa Cruz County.

<u>"Retailer</u>	<u>Date of Invoice</u>	<u>Invoice No.</u>
King's Liquor, Capitola	August 8, 1977	25505

#### "COUNT IV

"It was stipulated as true that on or about the dates set forth below, the respondent wholesale licensee did sell Lucky Lager beer in 11 oz. No return bottles posted at \$1.80 per 12-pack bottles, to licensed retailers, as set forth below, at \$1.70 per 12-pack bottles.

<u>"Date of Invoice</u>	<u>Invoice No.</u>		
7-26-77	14265	Brentwood Mkt.	12 Plaza Dr., Pacifica
8- 9-77	26259	Brentwood Mkt.	12 Plaza Dr., Pacifica
8-15-77	26393	Stagi's Liq.	3055-16th St., S.F.
8-16-77	27301	Brentwood Mkt.	12 Plaza Dr., Pacifica
8-16-77	26964	Bell Mkt.	1390 Silver, S.F.
8-15-77	26954	Gala Foods	201 Leland, S.F.
8-19-77	27050	Payless Drug Store	3975 Alemany, S.F.
8-16-77	26399	Gala Foods	690 Stanyan St., S.F.
8-22-77	27258	Brentwood Liq.	215 Kenwood Way, So. S.F.
8-23-77	27790	Gala Foods	1095 Hyde St., S.F.
8-23-77	26864	Brentwood Mkt.	12 Plaza Dr., Pacifica
8-26-77	28341	Payless Drug Store	3975 Alemany, S.F.
8-29-77	28577	Gala Foods	1445 Sutter St., S.F.
8-29-77	28577	Long's Drug Store	# 10 Bayhill, San Bruno
8-30-77	28550	Gala Foods	690 Stanyan St., S.F.

##### "COUNT V

"It was stipulated as true that on or about August 8, 1977, the respondent wholesale licensee did deliver malt beverages, as set forth below, to 855 Park Avenue, San Jose, a premises for which there has not been issued a valid permit or alcoholic beverage license.

<u>"Retail Licensee</u>	<u>Invoice Date</u>	<u>Invoice No.</u>
King's Liquor, Capitola	25505 (sic)	August 8, 1977 (sic)

This appeal is based on the provisions of Business and Professions Code section 23084.

At the department hearing, counsel for the parties stipulated as to the truth of the facts set forth in Counts I, IV and V of the accusation (R.T. 2, 6). The facts contained in Counts II and III of the accusation were also stipulated too, except as to the words "without having a territorial agreement . . ."; in lieu thereof, it was stipulated that no terri-



torial agreement was filed with the Department of Alcoholic Beverage Control (R.T. 6).

Anthony C. Ferrigno, the licensee, testified he holds a beer and wine wholesaler's license, beer and wine importers license and an off-sale beer and wine license. The witness stated that as to Count II of the accusation, he had an agreement with the manufacturer of Carlsburg Malt Liquor that he could sell it anywhere in Northern California; the department of ABC was informed thereof but refused to accept an agreement which referred to "Northern California", requiring that the specific counties be listed; when this was done, Butte County was overlooked (R.T. 8). As to Count III, he thinks it was also written up as "Northern California" but, when changed, it is possible that Santa Cruz County was omitted from the list; nevertheless, he did have an understanding or an agreement with the manufacturer that he could sell McEwans Tartan Ale and Leopard Lager in Santa Cruz County (R.T. 9A). With regard to Count V, the licensee testified they did deliver malt beverages to a hardware store located at 855 Park Avenue in San Jose, which beverages had been sold to King's Liquor, the holder of a retail liquor license in Santa Cruz (Capitola, R.T. 11)(R.T. 8-9); this was because the appellant, being "stuck for time", agreed to meet a representative of King's Liquor at 855 Park Avenue in San Jose; since the latter was not there, he left the malt beverages at this address; King's Liquor subsequently paid for these malt beverages (R.T. 9-10).

At the conclusion of the department hearing, Count V of the accusations was amended, over objection, to include a

violation of Business and Professions Code section 24040 (R.T. 15-16).

Documents relating to the above violations were received in evidence as Department's Exhibit 1.

It is contended on appeal that the ruling as to Counts I, II, III and IV should be reversed since Business and Professions Code sections 25000, 25000.5 and 25004, concerning beer, which appellant was determined to have violated, are similar to those statutes declared invalid by reason of the Sherman Antitrust Act in *Rice v. ABC Appeals Board and Corsetti*, 21 Cal.3d 431 and *Capiscean Corporation v. ABC Appeals Board and Department of Alcoholic Beverage Control*, 87 Cal.App.3d 996, which related to distilled spirits and wine, respectively.

#### COUNT I:

As to Count I, the licensee was determined to have violated Business and Professions Code section 25000<sup>1</sup> and section 105(b)<sup>2</sup>, Title 4 of the California Administrative

<sup>1</sup>Section 25000 provides:

"Each manufacturer, importer, and wholesaler of beer shall file and thereafter maintain on file with the department, in triplicate and in such form as the department may provide, a written schedule of selling prices charged by the licensee for beer sold and distributed by him to \* \* \* his customers in California, except that the transfer of beer between wholesalers who sell the same brand in package is permitted without filing the schedule of selling prices."

<sup>2</sup>Section 105(b) states:

"Each manufacturer, importer, or wholesaler of beer shall file a price schedule for each county in which his customers have their premises, whether the price which is posted is f.o.b. or delivered, or both. Trading areas within a county must be based on natural geographical differences justifying different prices and shall not be established for special customers."

Code; i.e.; failure, as a wholesaler of beer, to file with the department a schedule of the selling prices for beer sold by him to customers in California.

#### COUNTS II AND III:

It was determined that the licensee violated Business and Professions Code section 25000.5<sup>3</sup>, for selling beer, as a wholesaler, without having a territorial agreement with the manufacturer that the brands in question could be distributed by him in Butte and Santa Cruz counties. The statute further requires that a copy of the agreement be filed with the department. The licensee stipulated that no such agreement was filed with the department.

#### COUNT IV:

The department determined that appellant violated section 25004<sup>4</sup> since, as a wholesaler, he sold beer at a price less than the schedule of prices filed with the department.

<sup>3</sup>Section 25000.5 provides:

"(a) Every beer manufacturer, whether located within or without the state, who sells and distributes beer in this state shall designate territorial limits in the state within which the brands of beer manufactured by him may be sold by wholesalers of beer to retail licensees.

"(b) A wholesaler of beer shall not file a written schedule of selling prices to be charged by that licensee for any brand of beer unless he has first entered into a written agreement, with the manufacturer of that brand, which sets forth the territorial limits within which the brand shall be distributed by the wholesaler. A copy of such agreement, and any amendments thereto, shall be filed with the department."

<sup>4</sup>Section 25004 provides:

"Upon the filing of an original schedule of prices and after the effective date of any schedule of amendatory prices, all prices therein stated shall be strictly adhered to by the filing licensee, and any departure or variance therefrom by a licensee is a misdemeanor, *except that the transfer of beer between wholesalers who sell the same brand in package is permitted*

In *Rice v. ABC Appeals Board and Corsetti*, 21 Cal.3d 431, supra, the California Supreme Court declared the retail price maintenance provisions of Business and Professions Code section 24755, pertaining to distilled spirits, invalid. Subsequently, an appellate court, in *Capiscean Corporation v. ABC Appeals Board and Department of ABC*, 87 Cal.App.3d 996, supra, declared the price maintenance provisions set forth in Business and Professions Code section 24862, concerning wine, invalid because they differed from the price maintenance provisions relating to distilled spirits only in the type of beverage and the precise language of the respective sections, and that the impact of the restrictions is identical.

An appellate court in the recent case of *Midcal Aluminum, Inc., v. Rice*, 90 Cal.App.3d 979,<sup>5</sup> based on *Rice* and *Capiscean*, supra, held that the wine price maintenance provisions of the Business and Professions Code (Business and Professions Code section 24850 et seq.) violate the Sherman Anti-Trust Act and are thus invalid. This included Section 24862 of said code, which prohibited the selling of wine to a retailer (as well as to a consumer) at a price less than the selling price contained in an effective price schedule or in an effective fair trade contract; and section 24866, which required filing with the department a schedule of selling prices of wine to retailers or consumers,

*without filing the schedule of selling prices.* Each sale or transaction involving a violation of posted prices under this chapter is but a single offense or violation of this chapter regardless of the number of articles covered by the sale or transaction."

<sup>5</sup>Petition for hearing pending before the California Supreme Court.

which is not governed by a fair trade contract. The court stated it did not find the provisions of the fair trade laws relative to wholesale price maintenance different from those relative to retail price maintenance and that the price posting provisions also resulted in price fixing.

We note that paragraph (b) of Section 25000.5 is, in effect, a continuation of section 25000 (filing a schedule of selling prices for beer), since it provides that the requirements under the latter statute cannot be accomplished by a wholesaler unless he has first entered into a written agreement with the manufacturer of the brand which sets forth the territorial limits within which the brand shall be distributed by the wholesaler. As the court noted in *Midcal*, supra, with respect to wine (section 101(g), 4 California Administrative Code), only one person may file minimum price schedules for the same brand of malt beverage for the same trading area (section 90, Title 4, California Administrative Code). Furthermore, the price at which a malt beverage is sold at *retail* may vary between trading areas (Section 90, Title 4 of the California Administrative Code).

In view of the foregoing, Business and Professions Code sections 25000, 25000.5, 25004 and section 105(b), Title 4 of the California Administrative Code, supra, relating to malt beverages, would also appear to be invalid as being part of a scheme to fix prices, however, this board is prohibited from declaring said provisions invalid by reason of Article III, section 3.5 of the California Constitution. Because thereof, the department's decision is affirmed as to Counts I through IV.

## COUNT V:

The department determined that the appellant-wholesaler delivered malt beverages to premises which had not been issued a valid permit or alcoholic beverage license, thereby violating or permitting a violation of Business and Professions Code section 23355 or 24040. It is argued that these provisions do not prevent a wholesaler from making deliveries of liquor at places other than its own warehouse, nor prohibit a distributor from meeting a retailer at a convenient location and making delivery there. Business and Professions Code section 23355 provides:

"Except as otherwise provided in this division and subject to the provisions of Section 22 of Article XX of the Constitution, the licenses provided for in Article 2 of this chapter authorize the person to whom issued to exercise the rights and privileges specified in this article and no others *at the premises for which issued during the year for which issued* \* \* \*" (Emphasis added).

The record establishes that the appellant, a licensed wholesaler in San Francisco, had made arrangements with a licensed retailer in Capitola to meet and deliver malt beverages to the latter at a hardware store located at 855 Park Avenue, in San Jose. Since the retailer was not there, appellant's representative left the malt beverages at this address. It is presumed they were picked up by the retailer, as he subsequently paid for same. It is clear that the appellant, a licensed wholesaler, did not personally violate section 23355, which is only concerned with a person other than the licensee exercising the rights and privileges of a licen-



see. Moreover, for the licensee to have permitted another individual to exercise the privileges of a licensee, the conduct must have occurred at the licensed premises. Furthermore, the record is devoid of evidence as to the functions of a licensee which appellant permitted the operators of the hardware store to perform. The appellant did not intend to deliver beer to such persons; delivery was intended for a licensee in Capitola. The facts establish no more than an interruption of this intended delivery. We thus conclude that there is not substantial evidence in the record to establish that appellant permitted another person to exercise the privileges of a licensee in violation of Business and Professions Code section 23355.

Appellant was also determined to have violated or permitted a violation of Business and Professions Code section 24040 because of the above conduct. It states:

"Each license shall be issued to a specific person and, except in the case of licenses authorizing the sale of alcoholic beverages on trains or boats, or the service of alcoholic beverages on airplanes shall be issued for a specific location, the principal address of which shall be indicated on the license. Except as provided in section 24044, any license issued for a specific location shall be placed in use at that location within 30 days of the date of issuance."

A mere reading of the statute precludes its applicability to the licensed appellant herein.

Based on the foregoing, Ct. V is reversed. A separate penalty having been imposed as to each count, there is no

need to remand this matter to the department for reconsideration of the penalty. Counts I through IV are affirmed.

Peter M. Finnegan, Chairman  
Alcoholic Beverage Control  
Appeals Board

Member concurring:  
Jacob F. West

## **Appendix F**

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### **Price Schedule Statutes In Other States**

ARIZONA—Revised Statutes, Section 4-252

CONNECTICUT—General Statutes, Section 30-63

DELAWARE—Code, Article 4, Section 508

FLORIDA—Statutes, Section 565.15

HAWAII—Revised Statutes, Section 281-43

KANSAS—Statutes, Section 41-1113, 41-1114

MARYLAND—Code, Article 2B, Section 109(c)

MASSACHUSETTS—General Laws, Chapter 138, Section 25B

MINNESOTA—Statutes, Section 340.983

NEBRASKA—Revised Statutes, Section 53-168.02

NEW JERSEY—Statutes, Section 33:1-93

NEW MEXICO—Statutes, Section 46-13-1, 46-13-5

NEW YORK—Consolidated Laws, Section 101-b

OKLAHOMA—Statutes, Title 37, Section 536

**Appendix G**

**In the  
Court of Appeal of the State of California  
in and for the  
Third Appellate District  
3 Civil 17992**

Mideal Aluminum, Inc.,

vs.

Baxter Rice; California Retail Liquor  
Dealers Assn.

[Filed May 29, 1979]

BY THE COURT:

Intervenor's application for stay of issuance of peremptory writ of mandate is granted. Issuance of the writ is stayed until June 28, 1979.

Dated: May 29, 1979

Puglia, P. J.

Law Office of Damrell,

Damrell & Nelson

5900 Wilshire Blvd., No. 2600  
Los Angeles, Ca. 90036

Mr. George Roth

Deputy Attorney General  
555 Capitol Mall  
Sacramento, Calif. 95814

Mr. William T. Chidlaw

Attorney at Law  
1455 Response Road, Suite 191  
Point West Executive Center  
Sacramento, Calif. 95815



**Appendix H**

In the  
Court of Appeal of the State of California  
in and for the  
Third Appellate District  
3 Civil 17992

Midcal Aluminum, Inc.

vs.

Baxter Rice

[Filed June 27, 1979]

BY THE COURT:

Intervenor's request to extend stay order of May 29, 1979, is granted. Issuance of the peremptory writ of mandate is stayed until July 20, 1979.

Dated: June 27, 1979.

Puglia, P. J.

cc: Damrell, Damrell & Nelson

Attorneys at Law  
5900 Wilshire Blvd., No. 2600  
Los Angeles, CA. 90036

cc: George Roth

Deputy Attorney General

cc: William T. Chidlaw

Attorney at Law  
1455 Response Rd., Suite 191  
Point West Executive Center  
Sacramento, CA. 95815

**Appendix I**

Supreme Court, Appellate Division,  
Second Department.  
Dec. 11, 1978

In the Matter of William J. Mezzetti  
Associates, Inc.,

*Petitioner,*

vs.

State Liquor Authority of the State of  
New York,

*Respondent.*

Before SUOZZI, J. P., and GULOTTA, SHAPIRO and MARGETT, JJ.

**MEMORANDUM BY THE COURT**

Proceeding pursuant to CPLR article 78 *inter alia* to review a determination of the State Liquor Authority which, after a hearing, found that petitioner had violated section 101-bbb (subd. 5) of the Alcoholic Beverage Control Law, suspended its retail store license for a certain period and forfeited its bond in the sum of \$1,000.

Determination confirmed and proceeding dismissed on the merits, without costs or disbursements.

Section 101-bbb of the Alcoholic Beverage Control Law falls well within the intended scope of the Twenty-first Amendment to the United States Constitution and consti-

tutes State action which does not conflict with the Sherman Antitrust Act (see *Matter of Theodore Polon, Inc. v. State Liq. Auth.*, 59 A.D.2d 946, 399 N.Y.S.2d 469). We have considered petitioner's other contentions and find them to be without merit.

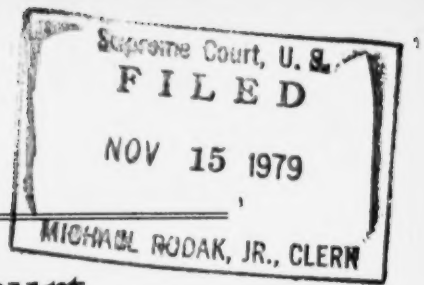
GULOTTA, SHAPIRO and MARGETT, JJ., concur.

SUOZZI, Justice Presiding, concurs in the result, with the following memorandum:

The majority holds that section 101-bbb of the Alcoholic Beverage Control Law falls within the scope of the Twenty-first Amendment to the United States Constitution and constitutes State action which does not conflict with the Sherman Antitrust Act. In so holding, the majority relies upon a prior decision of this court (*Matter of Theodore Polon, Inc. v. State Liq. Auth.*, 59 A.D.2d 946, 399 N.Y.S.2d 469).

I concur in the result reached by the majority solely on constraint of *Polon*. However, it is my view that section 101-bbb of the Alcoholic Beverage Control Law is violative of the Sherman Antitrust Act and, in that regard, I agree with the well-reasoned opinion of the Supreme Court of California in *Rice v. Alcoholic Beverage Control Appeals Bd.*, 21 Cal.3d 431, 146 Cal.Rptr. 585, 579 P.2d 476, which struck down a statute virtually identical to the one at bar as violative of the Sherman Antitrust Act.

JOINT APPENDIX



In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-97

CALIFORNIA RETAIL LIQUOR DEALERS ASSOCIATION,  
a California corporation,  
*Petitioner*

vs.

MIDCAL ALUMINUM, INC., a California corporation,  
*Respondent*

BAXTER RICE as Director of the Department of  
Alcoholic Beverage Control of the State of California  
*Respondent*

On Writ of Certiorari to the Court of Appeal of the  
State of California, Third Appellate District

PETITION FOR WRIT OF CERTIORARI  
FILED JULY 19, 1979  
CERTIORARI GRANTED OCTOBER 1, 1979



## TABLE OF CONTENTS

	<u>Page</u>
Reference to Omitted Opinion and Order .....	1
Chronological List of Relevant Docket Entries .....	2
Petition for Writ of Mandate .....	3
Stay Order .....	20
Ex Parte Application for Leave to Intervene .....	21
Order Discharging 8-29-78 Stay Order .....	48
Order Allowing Issuance of Alternative Writ of Man- date .....	49
Alternative Writ of Mandate .....	50
Order Discharging 9-22-78 Stay Order .....	52
Order Denying Petition for Rehearing .....	53
Order Extending 6-27-79 Stay Order .....	54

# In the Supreme Court

OF THE

United States

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OCTOBER TERM, 1979

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**No. 79-97**

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CALIFORNIA RETAIL LIQUOR DEALERS ASSOCIATION,  
a California corporation,  
*Petitioner*

vs.

MIDCAL ALUMINUM, INC., a California corporation,  
*Respondent*

BAXTER RICE as Director of the Department of  
Alcoholic Beverage Control of the State of California  
*Respondent*

---

**On Writ of Certiorari to the Court of Appeal of the  
State of California, Third Appellate District**

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The following Opinion and Order have been omitted in  
printing this appendix because they appear on the follow-  
ing pages of the appendices to the printed Petition for  
Writ of Certiorari:

Opinion of the Court of Appeal of the State of California,  
Third Appellate District ..... A-1

Order of the Supreme Court of California denying  
Intervenor's Petition for Hearing ..... B-1

**CHRONOLOGICAL LIST OF RELEVANT  
DOCKET ENTRIES**

IN THE COURT OF APPEAL OF THE  
STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

MIDCAL ALUMINUM, INC., *Petitioner*

vs.

BAXTER RICE, *Respondent*

CALIFORNIA RETAIL LIQUOR DEALERS ASSOCIATION,  
*Intervenor*

<u>Date</u>	<u>Filings—Proceedings</u>
8-18-78	Petition for writ of mandate
8-29-78	Letter from Damrell, Damrell & Nelson to Justice Evans
8-29-78	Stay order
9- 6-78	Certified copy of original stay order
9-15-78	Ex parte application for leave to file complaint in intervention
9-19-78	Respondent's opposition to petition
9-22-78	Order allowing issuance of alternative writ of mandate
9-22-78	Alternative writ of mandate
9-22-78	Order discharging 8-29-78 issuance of stay order
9-28-78	Letter from George Roth to Justice Puglia
9-28-78	Order discharging 9-22-78 stay order
10-12-78	Intervenor's response to petition
10-12-78	Points and authorities in support of intervenor's opposition to petition
11- 6-78	Petitioner's reply to opposition
3-26-79	Opinion by Justice Reynoso
4- 9-79	Petition for rehearing
4-18-79	Answer to petition for rehearing
4-19-79	Order denying petition for rehearing
5- 7-79	Petition for hearing (California Supreme Court)
5-15-79	Answer to petition for hearing (California Supreme Court)
5-24-79	Order denying hearing (California Supreme Court)
5-29-79	Stay order
6-25-79	Request to certify the record and transmit it to the Supreme Court
6-27-79	Stay order
7-19-79	Stay order

In the Court of Appeal of the State of California  
Third Appellate District

Civil No. 3 Civ. 17992

<p>Midcal Aluminum, Inc., a California corporation,</p>	<p>Petitioner,</p>
vs.	
<p>Baxter Rice as Director of the Department of Alcoholic Beverage Control of the State of California,</p>	<p>Respondent.</p>

Petition for Writ of Mandate  
Request for Temporary Stay  
Supporting Memorandum of Points and Authorities

\* \* \*

[Title Omitted in Printing]

PETITION FOR WRIT OF MANDATE

\* \* \*

Petitioner, MIDCAL ALUMINUM, INC., a California corporation, petitions this Court for a writ of mandate directed to Respondent, Baxter Rice, as Director of the Department of Alcoholic Beverage Control of the State of California (hereinafter called "Director"), and by this verified Petition alleges:



1. Petitioner is, and at all times hereinafter mentioned in this Petition was, a California corporation having a premises and place of business in Los Angeles County, State of California, at 2650 Commerce Way, Commerce, California 90022, where and from which it transacts and has transacted business as a duly licensed wholesaler of wine and distilled spirits pursuant to a Beer and Wine Wholesaler's license and a Distilled Spirits Wholesaler's license issued by the Department of Alcoholic Beverage Control of the State of California (hereinafter called "Department"), which said licenses are, and were at all times mentioned in this Petition, valid and fully effective. Additionally, Petitioner holds other licenses issued by the Department which are and were at all times mentioned in this Petition, valid and fully effective; namely, Beer and Wine Importer, Distilled Spirits Importer and Off-Sale Beer and Wine licenses. As a duly licensed wholesaler of wine and distilled spirits as aforesaid, distributor sells, and at all times mentioned in this Petition has sold, wine products and brandy to retailers in Los Angeles and Orange Counties in the State of California for resale to consumers pursuant to alcoholic beverage retail licenses likewise issued to said retailers by the Department.

2. The Department is, and at all times herein mentioned was, a duly and regularly constituted agency and department of the State of California. Respondent Director is the duly appointed, qualified and incumbent director of the Department and its chief executive officer.

3. Respondent has a clear, present and legally mandated duty to administer and enforce the provisions of the Alcoholic Beverage Control Act (Division Nine of the

Business and Professions Code) in conformity with the laws of the State of California and the laws of the United States. Such laws do not sanction or permit the administration and enforcement of provisions of any law, including those of said Alcoholic Beverage Control Act, which are unconstitutional on their face. As will hereinafter appear, the price-posting provisions of the Alcoholic Beverage Control Act are unconstitutional and in violation of the Sherman Anti-Trust Act (15 U.S.C. § 1, et seq.). Specifically, Sections 24862 and 24866 of the Business and Professions Code, the regulations promulgated to implement those sections (Calif. Admin. Code, Chapter 1, Title 4, Section 101) and the enforcement actions of the Department in accordance with such sections and regulations are unconstitutional. Nevertheless, Respondent has advised licensees that the Department has no choice but to continue to administer and enforce those sections (including Sections 24862 and 24866) of the law, by memorandum dated July 6, 1978, to all price-posting licensees, and by letter dated July 11, 1978, to Mr. John DeLuca, President, Wine Institute, copies of which memorandum and letter are attached hereto as Exhibits "A" and "B" respectively.

4. Prior to May 30, 1978, Petitioner complied fully with the price-posting provisions of the Alcoholic Beverage Control Act (Division Nine of the Business and Professions Code) and the regulations adopted to implement such price-posting provisions.

5. On May 30, 1978, the California Supreme Court ruled that certain price-posting provisions of the Business and Professions Code were invalid in that they violated the Federal Sherman Anti-Trust Act (15 U.S.C. § 1, et seq.).

*Rice v. Alcoholic Beverage Control Appeals Board (Corsetti)* (1978) 21 Cal.3d 431.

6. The *Rice (Corsetti)* decision was limited by its facts to the statutory provisions and regulations applicable to minimum consumer price posting for distilled spirits and beer [Business and Professions Code, Section 24755; Cal. Admin. Code, Title 4, Section 99, subdivision (a)]. However, the clear impact of the *Rice (Corsetti)* decision, as evidenced by the language and the reasoned analysis of the court, was to rule that all price-posting provisions of the Code were invalid.

7. Petitioner has a clear, present and substantial right to be protected from enforcement by Respondent of the unconstitutional price-posting provisions of the Alcoholic Beverage Control Act. Petitioner and Petitioner's licensed retail customers are licensees of Respondent and the continued legal distribution and sale by Petitioner of bottled wine products to Petitioner's licensed retail customers are dependent upon the issuance and renewal of Petitioner's license by Respondent. On August 15, 1978, Respondent filed an Accusation against Petitioner, threatening Petitioner with penalties because Petitioner failed to comply with the price-posting provisions of the Business and Professions Code, Section 24862, and Rule 101 of Chapter 1, Title 4, California Administrative Code. A copy of the Accusation is attached hereto as Exhibit "C" and incorporated herein. Attached hereto as Exhibit "D" and incorporated herein is a Stipulation dated August 15, 1978, in which Petitioner, by its attorney, Frank C. Damrell, Jr., stipulated to the truthfulness of the facts set forth in said Accusation and further stipulated that the Department may,

subject to a judicial determination of the constitutionality of Section 24850, et seq., Business and Professions Code, "Wine Fair Trade Contracts and Price Posting," and Rule 101 of Chapter 1, Title 4, California Administrative Code, impose a monetary penalty or suspension of Petitioner's licenses as provided in Section 24880 of the Business and Professions Code.

8. If, on the other hand, Petitioner complies with such unconstitutional price-posting provisions, Petitioner may be subjected to substantial claims and potential liabilities, criminal and civil, for allegedly violating the Sherman Anti-Trust Act (15 U.S.C. § 1, et seq.) in light of the *Rice (Corsetti)* decision.

9. Among other things, said unconstitutional price-posting provisions prohibit the sale in this state by licensed wholesalers, such as Petitioner, of bottled wine to licensed retailers except at the selling or resale price thereof contained either in an effective price schedule or in an effective fair trade contract filed with the Department. Since May 30, 1978, and particularly during the month of July, 1978, Petitioner sold bottled wine to licensed retailers in California, as alleged in the Accusation attached hereto as Exhibit "C", not listed in or at prices other than those contained in an effective price schedule or an effective fair trade contract filed with the Department.

10. Petitioner faces additional, immediate and substantial financial loss in that licensed retail customers of Petitioner have informed Petitioner that they will refuse to buy or resell bottled wine products sold and distributed by Petitioner unless such bottled wine products and the prices

at which Petitioner will sell them to licensed retailers are included in an effective price schedule or in an effective fair trade contract filed with the Department.

11. Petitioner is the party beneficially interested in the relief sought in this Petition for the following reasons:

(a) Respondent has filed an Accusation against Petitioner, and Petitioner is threatened with a monetary penalty or suspension of Petitioner's license to sell wine products at wholesale in the State of California (Exhibits "C" and "D").

(b) Petitioner is placed in the untenable position of having to choose between obeying federal and state laws which conflict with each other and being threatened with penalties for disobeying whichever one Petitioner fails to comply with.

(c) Petitioner may be subjected to substantial claims and potential liabilities, civil and criminal, for allegedly violating the Sherman Anti-Trust Act (15 U.S.C. § 1, et seq.) if it obeys the invalid state law.

(d) Petitioner risks substantial financial loss because licensed retailers will refuse to buy or resell bottled wine products sold and distributed by Petitioner if Petitioner obeys the California Supreme Court and the Federal Sherman Anti-Trust Law and fails to comply with the unconstitutional price posting provisions of the Alcoholic Beverage Control Act being enforced by Respondent.

12. Respondent has failed and refused, and continues to fail and refuse, to recognize the invalidity and unconstitutionality of the price-posting provisions of the Al-

coholic Beverage Control Act, but rather continues to administer and enforce the same.

13. Petitioner has no plain, speedy and adequate remedy in the ordinary course of law, other than the relief sought in this Petition, in that:

(a) Petitioner should not be required to defend itself in quasi-judicial license suspension or revocation proceedings charging Petitioner with a violation of a patently unconstitutional statute.

(b) Defense in such quasi-judicial proceedings would be to no avail, since admittedly Petitioner has not complied with the unconstitutional price-posting provisions, and since the quasi-judicial body claims it has no authority to rule on the constitutionality of such unconstitutional price-posting provisions.

(c) Defense in such quasi-judicial proceedings and appeal therefrom would be prohibitive to Petitioner in terms of time and economic losses.

(d) Petitioner faces immediate and substantial losses unless a stop to the enforcement of the aforesaid unconstitutional price-posting provisions is ordered by this Court.

(e) Mandamus from this Court directed to the Director of the Department is the only immediate remedy for declaring the wine price-posting provisions of the Alcoholic Beverage Control Act, and regulations promulgated pursuant thereto, unconstitutional (Business and Professions Code, Section 23090.5).

14. In view of the clear unconstitutionality of the aforesaid price-posting statutory provisions and regulations,



and the immediate, substantial and irreparable harm to Petitioner by Respondent's continued enforcement thereof, Petitioner seeks an immediate stay of Respondent's enforcement of such price-posting provisions and regulations and an order that Respondent cease, desist and refrain from any further action enforcing such price-posting provisions and regulations, pending a hearing on this matter.

15. This Petition is made to this Court in the first instance rather than to the Superior Court of the State of California, County of Sacramento, for the reason that this Court is the court of original jurisdiction for the filing of a Writ of Mandate directed at administrative actions of the Director of the Department of Alcoholic Beverage Control under Section 23090.5 of the Business and Professions Code.

WHEREFORE, Petitioner prays judgment against Respondent as follows:

1. That this Court issue an alternative writ of mandate commanding Respondent to dismiss the Accusation filed on August 15, 1978, against this Petitioner and to cease enforcement of the wine price-posting provisions of the Alcoholic Beverage Control Act, to wit, Sections 24850, et seq., and more particularly, Sections 24862 and 24866 of the Business and Professions Code, and regulations promulgated pursuant thereto, and more particularly Rule 101 of Chapter 1, Title 4, California Administrative Code, or to show cause before this Court at a specified time and place why he has not done so.

2. That, pending a hearing on this Petition, this Court issue its stay order commanding Respondent to cease, de-

sist and refrain from further action on the Accusation filed against this Petitioner on August 15, 1978, and from any further action in enforcing the wine price-posting provisions of the Alcoholic Beverage Control Act, to wit, Section 24850, et seq., and more particularly, Sections 24862 and 24866 of the Business and Professions Code, and the regulations promulgated pursuant thereto, and more particularly, Rule 101 of Chapter 1, Title 4, California Administrative Code.

3. That, on the hearing of this Petition and the return thereto, if any, this Court issue its peremptory writ of mandate compelling Respondent to dismiss the Accusation filed on August 15, 1978, against this Petitioner and to cease enforcement of the wine price-posting provisions of the Alcoholic Beverage Control Act and regulations adopted pursuant thereto.

4. For costs of this proceeding and such other and further relief as the Court may deem proper.

Dated: August 18, 1978.

[Signature and Verification Omitted in Printing]

**EXHIBIT A**

Letterhead of Department of Alcoholic Beverage Control

July 6, 1978

TO: ALL PRICE POSTING LICENSEES

As you are aware, the May 30, 1978, decision of the California Supreme Court in the matter of *Rice v. Alcoholic Beverage Control Appeals Board* struck down the consumer price maintenance provisions of Section 24755 of the Alcoholic Beverage Control Act.

Some confusion has arisen among [sic] price posting licensees as to the impact of that decision on related sections and regulations within the Act dealing with price filings at other levels.

The decision of the court, which is now in effect, dealt only with the *consumer* price filings for distilled spirits and beer. Accordingly, brand owners or authorized licensees who were previously filing Forms ABC-705 (distilled spirits) and ABC-704 (beer) need no longer, and should not, continue to file those forms with the Department.

The question before the court and the resulting decision did not directly address or affect Sections 24862 (wine), 25000 (beer), and 24756 (distilled spirits) which require supplier level licensees to file price schedules showing the prices at which alcoholic beverages are sold to *retailers*.

Therefore, licensees who were previously filing price and discount schedules for prices at the wholesaler to retailer level, including brewery to wholesaler in the case of beer, must continue to comply with the applicable sections of law and adhere to such prices and discounts on all sales.

Any question as to the constitutionality of the sections cited above must be resolved by legislative action or by a court decision. In the meantime, the Department has no choice but to continue to administer and enforce those sections of law.

[Signature Omitted in Printing]

**EXHIBIT B**

Letterhead of Department of Alcoholic Beverage Control

July 11, 1978

Mr. John A. De Luca

President

Wine Institute

165 Post Street

San Francisco, CA 94108

Dear Mr. De Luca:

In your letter of July 7, 1978, the following question is posed:

"Until legislative or court action further clarifies and defines the scope of the California Supreme Court's decision in the case of Rice v. Alcoholic Beverage Control Appeals Board, will the California Department of Alcoholic Beverage Control continue to administer and enforce those provisions of Sections 24862 and 24866 of the Alcoholic Beverage Control Act which require wine suppliers to post minimum *consumer* prices?"

After a careful reading of the case to which you refer and considering the strictures imposed by the recently enacted Proposition 5, the Department believes it has no choice but to continue to administer and enforce the sections of law not specifically ruled upon by the California Supreme Court.

Among the sections the Department will continue to enforce are those you mention, i.e., Sections 24862 and 24866 of the Alcoholic Beverage Control Act.

If we may be of further assistance, please call on us.

[Signature Omitted in Printing]



**EXHIBIT C****State of California****Department of Alcoholic Beverage Control**

File 38195

Reg. 10381

License Nos. 17, 09, 18, 12, 20

In the matter of the accusation against

**MID CAL ALUMINUM, INC.**

D.B.A. Gallo Wine Co. Respondent(s)

PREMISES: 2650 Commerce Way  
CommerceLICENSE(S): Beer & Wine Importer,  
Distilled Spirits Importer,  
Beer & Wine Wholesaler,  
Distilled Spirits Wholesaler,  
Off-Sale Beer & Wine**ACCUSATION**Under Alcoholic Beverage Control Act  
and State Constitution

I hereby complain and accuse the above respondent(s), holding the above license(s), based on the following statement of fact:

**COUNT I**

On or about July 21, 1978, respondent-licensee did sell and cause to be sold to Cork & Bib Liquor, Inc., an off-sale general licensee retailer, at 16262 San Fernando Mission Road, Granada Hills, CA, items of wine, to-wit: 4 cases of 1.5 liter bottles Gallo Spanada; 12 cases of 1.5 liter bottles Vin Rose

and 11 cases of 1.5 liter bottles Gallo Rhine Garten, at prices less than the selling prices as posted in the then effective price schedule duly filed with the Department by E. & J. Gallo Winery on May 15, 1978, for said Vin Rose and on April 17, 1978 for said Spanada and Rhine Garten.

**COUNT II**

Within one year last past and on the dates set forth hereinbelow, respondent-licensee, did sell and cause to be sold to the below-identified retailers, items of wine, to-wit: cases of 1.5 liter bottles of Carlo Rossi Red Mountain brand wines, at which time there was no effective price schedule or an effective fair trade contract duly filed with the Department as required by Rule 101 of Chapter 1, Title 4, California Administrative Code.

<u>Date</u>	<u>Retailer</u>	<u>License #</u>
July 21, 1978	Arthur Harlig 14114 Van Owen Street Van Nuys	21-32725
July 13, 1978	Lucky Stores, Inc.	
July 19, 1978	Albertson's, Inc.	
	Licensed since 12-31-70	

Licensee(s) Previous Record:

Reg. # 4261, Viol Sec. 25502, 25600 & Rule 101(b), 2-13-76 5 days all stayed: Reg. # 16841, Viol Sec. 23661, 3-8-73, 5 days all stayed:

(1) That by reason of the foregoing facts, grounds for suspension or revocation of such license(s) exist and the continuance of such license(s) would be contrary to public welfare and morals, as set forth in Article XX, Section 22, State Constitution, and Section 24200(a), Business and Professions Code;

## All Counts

(2) That additional grounds for suspension or revocation under Section 24200 (.....) (.....) (.....), Business and Professions Code, exist in that respondent(s) have violated, or permitted the violation of:

(a) Business and Professions Code Section(s) 24862—Count I & II

(b) Title IV, Cal. Admin. Code, Rule(s) 101—Count I & II

(c) Other law: .....

Wherefore, I recommend that a hearing be held on this accusation.

Dated this 15 day of August, 1978

Reviewed: FB(L)

[Signature Omitted in Printing]

\* \* \*

**EXHIBIT D**

Before The  
Department of Alcoholic Beverage Control  
of the State of California

File 09, 12, 17, 18, 20-38195

Reg. 10381

In the Matter of the Accusation against:

Mid Cal Aluminum, Inc.

dba: Gallo Wine Co.

2650 Commerce Way

Commerce

Respondent

under the Alcoholic Beverage Control Act.

STIPULATION

The above-named Respondent does hereby:

1. Acknowledge receipt of the Accusation (with printed statement to Respondent) and forms for notice of defense in the above-entitled action.

2. Stipulate to the truthfulness of the facts as set forth in the Accusation.

3. Stipulate as follows:

Based upon Paragraph 2, the Department may, subject to a judicial determination of the constitutionality of Section 24850, et seq., Business and Professions Code and Rule 101 of Chapter 1, Title 4, California Administrative Code, impose a monetary penalty or sus-

pension of Respondent's licenses as provided in Section 24880 of the Business and Professions Code.

Signed this 15th day of August, 1978.

[Signature Omitted in Printing]

\* \* \*

In the  
Court of Appeal of the State of California  
in and for the  
Third Appellate District  
3 Civil 17992

[ORDER]

[Filed Aug. 29, 1978]

Mideal Aluminum, Inc.

v.

Baxter Rice

By the Court:

Good cause appearing, respondent is hereby commanded forthwith to cease, desist and refrain from any further action on the accusation against petitioner filed August 15, 1978, and from any further action in enforcing the wine price-posting provisions of the Alcoholic Beverage Control Act, to wit, Section 24850, et seq., and more particularly, Sections 24862 and 24866 of the Business and Professions Code, and the regulations promulgated pursuant thereto, and more particularly, Rule 101 Chapter 1, Title 4, California Administrative Code, as to petitioner, pending filing of opposition to the petition for writ of mandate and further order of this court.

Dated: August 29, 1978

Regan, Acting P. J.

\* \* \*

In the Court of Appeal of the State of California  
Third Appellate District  
3 Civ. 17992

Mideal Aluminum, Inc.,  
a California corporation,

Petitioner,

vs.

Baxter Rice as Director of the Department  
of Alcoholic Beverage Control of the  
State of California,

Respondent,

California Retail Liquor Dealers Associa-  
tion, a California corporation,

Intervenor.

Ex Parte Application for Leave to File  
Complaint In Intervention  
Complaint In Intervention  
Supporting Declaration  
Memorandum of Points and Authorities

\* \* \*

[Title Omitted in Printing]

EX PARTE APPLICATION FOR  
AND COURT ORDER GRANTING  
LEAVE TO INTERVENE

The California Retail Liquor Dealers Association, as the representative of its members, hereby applies for leave to intervene in the above captioned action as authorized by



Section 387 of the Code of Civil Procedure on the grounds that it has an interest herein which will be directly affected by the judgment and the temporary restraining order issued, that it has an interest in the success of the respondent, and that its interests are not adequately represented by the existing parties. Intervenor's members' interest affected by the result of this action, and the temporary restraining order issued by this Court are as follows:

(1) The price posting provisions of Chapter 11 of the Alcoholic Beverages Control Act provide direct and substantial protections to intervenor's members against unfair, unlawful and predatory trade practices, and the judgment sought herein, and the temporary restraining order already issued, deprive intervenor's members of those significant protections;

(2) The provisions of Chapter 11 which require fair trade contracts in the marketing of wine in California provide substantial and direct protection to intervenor's members against unfair, unlawful and predatory trade practices, and further, the judgment sought herein, and the temporary restraining order issued by this Court, deprives intervenor's members of substantial and significant economic benefits;

(3) As a practical matter, disposition of this proceeding in the absence of intervenor, or its members, would impair and impede intervenor's members' ability to protect their interests. Intervenor's interest herein are more particularly set forth in the Complaint in Intervention, Points and Authorities, and Declaration accompanying this Application.

I, WILLIAM T. CHIDLAW, attorney at law, am the attorney for the intervenor CALIFORNIA RETAIL LIQUOR DEALERS ASSOCIATION, and declare, under penalty of perjury, that the foregoing is true and correct and that this declaration was executed on September 7, 1978, at Sacramento, California.

[Signature Omitted in Printing]

\* \* \*

In the Court of Appeal of the State of California

Third Appellate District

[Title Omitted in Printing]

3 CIV. 17992

#### COMPLAINT IN INTERVENTION

Intervenor CALIFORNIA RETAIL LIQUOR DEALERS ASSOCIATION, by leave of Court, alleges:

#### I

Intervenor is the CALIFORNIA RETAIL LIQUOR DEALERS ASSOCIATION (hereafter CRLDA), and is a trade association duly organized and existing under the laws of the State of California. Intervenor's membership consists of a substantial number of the independent retail liquor dealers throughout the State of California. Intervenor has over 3,000 members, all of whom are similarly situated with respect to the issues presented by this litigation. Intervenor's members hold approximately one-third of the licenses for retail sales of alcoholic beverages for consumption off premises in California. Intervenor's members are individually too numerous to come before the Court but constitute a class of persons each of whom has

the same substantial and direct interests in the judgment to be rendered herein. Intervenor therefore seeks intervention as the representative of the class of its membership.

## II

On August 18, 1978, petitioner MIDCAL ALUMINUM, INC. commenced this proceeding against the respondent, BAXTER RICE as Director of the Department of Alcoholic Beverage Control of the State of California, seeking a writ of mandate to declare Chapter 11 of the Alcoholic Beverage Control Act (Bus. & Prof. Code § 24850 et seq), and regulations promulgated under it, to be invalid under federal law for reasons allegedly set forth in the decision of the California Supreme Court in *Rice v. Alcoholic Bev. etc. Appeals Board (Corsetti)*, 21 Cal.3d 431 (1978).

## III

On August 29, 1978, this Court issued a temporary restraining order barring the respondent from any further action on an accusation against petitioner and from enforcing Chapter 11 of the Alcoholic Beverage Control Act.

## IV

Chapter 11, and the regulations promulgated under it, require the posting of the prices, with the Department of Alcoholic Beverage Control, at which wine will be sold by wholesalers to retailers. Chapter 11 also contains provisions of the Alcoholic Beverage Control Act requiring fair trade contracts for wine and the posting of the retailer to consumer price. The judgment sought herein is a declaration as to the validity of Chapter 11 and the regulations promulgated thereunder.

## V

Intervenor intervenes in this action on the grounds that it has an interest in the matters in litigation and has a substantial interest in the success of the respondent and, as a practical matter, disposition of this matter in the absence of intervenor will impair and impede its members' ability to protect their interests. The matters in litigation are the validity of the wine price posting requirements and the validity of the wine fair trade contracts. Intervenor's members' interests herein are as follows:

(a) The judgment sought herein will directly affect intervenor's members to the extent that it upholds or invalidates resale price maintenance in wine. The statutory and regulatory provisions which petitioner seeks to invalidate here relate to the prices at which intervenor's members buy and sell wine. The resale price maintenance provisions have a direct impact on the profitability of the businesses owned and operated by intervenor's members. Fair trade provisions for wine have also promoted competition in the retail market on the basis of other than price and enabled intervenor's members to provide services that create substantial good will, and which will be lost if resale price maintenance in wine is invalidated. Further, the loss of resale price maintenance for wine will substantially decrease the value of the licenses held by intervenor's members.

(b) Resale price maintenance in wine is intervenor's members' major defense against predatory pricing, discriminatory pricing and other unfair business practices by wholesalers and other retailers of wine.

(c) The challenged sections and the regulations promulgated thereunder also require the posting of the prices from wholesaler to retailer. These prices are filed with respondent and published. Because they are required, in existence and published they act as a deterrent to discriminatory practices as well as an enforcement tool.

(d) In the event that consumer resale price maintenance provisions for wine are invalidated, the price posting provisions of the challenged statutes and regulations will be an even more vital means for intervenor's members to protect themselves against predatory and discriminatory conduct by both wholesalers and other retailers. The requirement of price posting greatly aids in the detection and enjoining of unfair and discriminatory pricing practices, and other violations of the Unfair Practices Act (Bus. & Prof. Code § 17000 et seq) and various other provisions of the Alcoholic Beverages Control Act such as that prohibiting gifts and rebates (Bus. & Prof. Code § 25600). Inasmuch as price wars have already begun, these protections are critical to survival of intervenor's members' businesses.

(e) The temporary restraining order issued on August 29, 1978, is unnecessarily broad and impinges on the rights and interests of intervenor's members. The order frees petitioner from the posting requirements and the fair trade requirements of Chapter 11. Intervenor and all other retailers and all wholesalers remain subject to the requirements of Chapter 11. Under the temporary restraining order, petitioner has obtained unfair competitive advantages. Further, petitioner holds a dominant position in the wine market in the Southern California trading area. Freeing petitioner from Chapter 11 removes major

restraints on the possibility of petitioner's use of its dominant position to engage in predatory and discriminatory price practices which would injure intervenor's members' businesses. Furthermore, petitioner is owned and controlled by four of the six persons controlling and owning the E. & J. Gallo Winery which holds a dominant position in the wine production business in California. There is thus a substantial vertical integration which could be used to further injure competition in the wholesale and retail wine markets. The provisions of Chapter 11 protects intervenor's members against such abuse of market power. Intervenor, therefore, seeks intervention to seek modification of the restraining order to merely limit respondent from proceeding with the imposition of the penalty under the accusation against petitioner pending litigation.

## VI

Intervenor has a substantial interest in the success of the respondent herein. However, as shown by the materials attached to the petition on file herein, as Exhibits "A" and "B", the respondent appears to be less interested in upholding the validity of the provisions of the Alcoholic Beverage Control Act involved than intervenor. Respondent did not appeal the decision in *Rice, (Corsetti)*, (supra), to the U.S. Supreme Court notwithstanding that that decision was premised exclusively upon an interpretation of recent United States Supreme Court opinions, and was based solely on federal law. Further, respondent has not objected to the overbroad restraining order sought by petitioner. Intervenor therefore intervenes in order that this matter may be fully litigated and that its members' interests may be protected.



## VII

Petitioner has brought this proceeding for the purpose of having Chapter 11 of the Alcoholic Beverage Control Act and the regulations promulgated thereunder (specifically Cal.Admin. Code, Ch. 1, Title 4, Sec. 101) declared invalid as being in violation of the Sherman Antitrust Act (15 USC § 1 et seq.).

## VIII

Said provisions are not violative of the Sherman Antitrust Act. The provisions of Bus. & Prof. Code § 24862 and 24866, and the regulations promulgated under them, which require fair trade contracts or price schedules fixing minimum retail to consumer resale prices cannot be violative of the Sherman Act for the reason that they are within the ambit of the 21st Amendment of the United States Constitution, and further, the actions are within the so-called "state action" exemption of the Sherman Act for the reason that they are expressly compelled by the law of the State of California as part of a comprehensive alcoholic beverages regulatory program. The sales of wine involved here are purely sales within the State of California by licensed wholesalers to licensed California retailers, and by those retailers to consumers in California.

To the extent that the provisions of Bus. & Prof. Code §§ 24862 and 24866, and the regulations promulgated thereunder, require the filing and publication of the prices at which wine wholesalers sell to retailers, there can be no possible violation of the Sherman Antitrust Act or any other federal act. Said conduct does not constitute a restraint on trade, and further is a necessary and integral part of the prohibitions against unfair business practices

and other undesirable business and trade practices prohibited by the Alcoholic Beverage Control Act.

WHEREFORE, intervenor prays judgment against petitioner as follows:

1. That CRLDA be permitted to intervene herein on behalf of its members and to answer petitioner's application for a peremptory writ;
2. That this Court issue a published opinion holding that the provisions of Bus. & Prof. Code §§ 24862 and 24866, and the regulations promulgated thereunder, are valid and enforceable and do not violate or are not contrary to the Sherman Antitrust Act either in requiring the posting of prices with the Department of Alcoholic Beverage Control or in requiring minimum resale or fair trade contracts in wine;
3. That this Court modify the restraining order issued on August 29, 1978 by not enjoining enforcement of Chapter 11 and only restraining respondent from proceeding with the imposition of penalty under the accusation against petitioner pending litigation;
4. For the costs of this proceeding;
5. For such other and further relief as the Court may deem just and proper.

Dated: September 7, 1978.

[Signature and Verification Omitted In Printing]

In the Court of Appeal of the State of California

Third Appellate District

3 Civ. 17992

[Title Omitted in Printing]

# MEMORANDUM OF POINTS AND AUTHORITIES

## I

The California Retail Liquor Dealers Association  
Should Be Granted Leave to Intervene  
in This Proceeding

In an original proceeding in mandamus filed in this Court, petitioner MIDCAL ALUMINUM, INC. (hereafter Midcal) is, in effect, seeking a judicial determination that California Bus. & Prof. Code §§ 24862 and 24866 are invalid under federal law and that this Court order the Director of Alcoholic Beverage Control to "cease enforcement of the wine price-posting provisions of the Alcoholic Beverage Control Act, to-wit, Sections 24850 et seq., . . ." and Rule 101 of the Department relating to the wine price posting. Petitioner has obtained a temporary restraining order relieving it from complying with Chapter 11 of the Act.

The CALIFORNIA RETAIL LIQUOR DEALERS ASSOCIATION (hereafter CRLDA) seeks to intervene in this proceeding as the representative of its members.<sup>1</sup> Its mem-

<sup>1</sup>It is well settled that an organization—even an ad hoc group formed specifically for litigation—may represent its members in an action defending their common interests. See, e.g., *Witkin*, 3 *Cal. Procedure* 2d, Pleading, § 180B (Supp.); 1 *Newberg on Class Actions*, § 1815(b) (1977). These are basically "limited class" actions and are termed "representative actions". *Salton City etc. Owners Assn. v. M. Penn Phillips, Inc.*, 75 Cal.App.3d 184 (1977);

bers' interests are directly affected by the judgment sought and the restraining order already issued. Unfavorable disposition of this action will impair and impede its members' ability to protect their interests. Its members' interests may not be adequately protected by existing parties. (See Declaration of Mandella attached as Exhibit "A".) Leave to intervene under C.C.P. § 387 should therefore be granted.

C.C.P. § 387 was significantly amended by Stats 1977, Ch. 450, § 1. Although intervenor is aware of no case that has yet interpreted the amendment,<sup>2</sup> it appears that the addition of subsection (b) was intended to clarify and expand the right to intervene to cover situations such as that involved here—where the intervenor has significant interests affected by the precedent sought; where, as a practical matter, the outcome will impair or impede the intervenor's ability to protect that interest; and the existing parties may not adequately protect that interest. See, "Review of Selected 1977 California Legislation", 9 *Pacific LJ* at 356-358 (1978); C.E.B., 2 *Civil Procedure Before Trial*, § 25.1 (1978).

The courts developed a somewhat similar "fairness" standard for intervention under C.C.P. § 387 as it read prior to the 1977 amendment. In *Bustop v. Superior Court*,

*Residents of Beverly Glen, Inc. v. City of Los Angeles*, 34 Cal.App. 3d 117, 109 Cal.Rptr. 724 (1973). Trade associations may represent their members in proceedings challenging the validity of legislation affecting the members' business. *Jellen v. O'Brien*, 89 Cal.App. 505, 264 P 1115 (1928). It is appropriate for CRLDA to act as a representative intervenor. See also, *Bustop v. Superior Court (Board of Education of the City of Los Angeles)*, 69 Cal.App.3d 66, 137 Cal.Rptr. 793.

<sup>2</sup>The amendment was mentioned but not discussed in *Redevelopment Agency v. City of Berkeley*, 80 Cal.App.3d 158, 165 (1978) because the right of intervention was not at issue on appeal.

69 Cal.App.3d 66, 137 Cal.Rptr. 793 (1977) the Court of Appeal directed the lower court to grant leave to intervene based on considerations of fairness. The underlying action was a proceeding to review a desegregation plan for compliance with the opinion of the California Supreme Court. Plaintiffs were members of various ethnic groups who had brought suit to force desegregation. Defendant was the school district in which the intervenor's children attended school. Defendant's plan involved massive busing. Intervenor, representing a large number of middle class, predominantly white, parents of students affected sought intervention to contest the necessity of busing.

The parties opposed intervention because intervenor had a different interpretation of the Supreme Court ruling. 69 Cal.App.3d at 71. The objections to intervention were that intervenor had no direct interest in the "judgment" to be rendered (69 Cal.App.3d at 70) except the general public's interest, which, it was contended was represented by the district. (69 Cal.App.3d at 71.) The trial court denied intervention.

The Court of Appeal ordered the trial court to grant intervention. (This distinguishes the case from other intervention opinions which seem to turn more on whether the trial court's ruling was supported by "substantial evidence".) Since intervenor and the district had dissimilar interpretations of the pertinent case law, the district could not adequately represent intervenor's interests (69 Cal. App.3d at 71-72).

It was also well established under former C.C.P. § 387 that where a party purporting to represent intervenor's interest might not adequately do so, leave to intervene

should be granted. Witkin, 3 *Calif. Procedure 2d*, Pleading, § 208; *Fireman's Fund Insurance Co. v. Gary C. Gerlach*, 56 Cal.App.3d 299, 128 Cal.Rptr. 396 (1976); *Gerald Kobernick v. Walter M. Shaw*, 70 Cal.App.3d 914, 139 Cal. Rptr. 188 (1977). This principle has been applied to actions brought by the government to enforce regulatory statutes enacted, in part, to protect the class of persons represented by the intervenor. *People v. Superior Court (Good)*, 17 Cal.3d 732, 737, 131 Cal.Rptr. 800 (1976). [District Attorney.]

As demonstrated hereinafter, under both present and former C.C.P. § 387, CRLDA qualifies for intervention in this proceeding.

The basic thrust of both the judgment sought herein and the restraining order obtained by petitioner directly challenges the validity, under federal antitrust law, of two sections of the Alcoholic Beverage Control Act, Bus. & Prof. Code §§ 24862 and 24866. These sections require the posting of the prices at which wine is sold by the wholesaler to retailer, (c.f., Bus. & Prof. Code §§ 24756, relating to distilled spirits and 25000 relating to beer). Bus. & Prof. Code § 24862 also prohibits the retail sale of wine by a retailer to a consumer at less than prices contained in either a fair trade contract or in a price schedule filed with the Department of Alcoholic Beverage Control. Petitioners contend that the ruling in *Rice v. Alcoholic Bev. etc. Appeals Board (Corsetti)*, 21 Cal.3d 431 (1978, holding Bus. & Prof. Code § 24755(a)-(f) contrary to the Sherman Act (15 USC §§ 1, 2), also invalidates §§ 24862 and 24866, both as to posting of the price from wholesale to retail and the prohibition of sales from retailer to consumer at less than the



price contained in either a fair trade contract or a price schedule.

The price posting requirements of Bus. & Prof. Code §§ 24862 and 24866 (and the similar requirements of §§ 24756 and 25000) constitute a significant protection for intervenor's members against predatory and discriminatory pricing practices, and unfair competition. Bus. & Prof. Code §§ 17000 et seq. (Unfair Practices Act), 24755(g), 24877, 25600<sup>3</sup>, (Alcoholic Beverage Control Act).

Resale price maintenance and fair trade contracts were formerly the major defense against such practices[,] (*Wilke & Holzheiser, Inc. v. Dept. of Alcoholic Bev. Control*, 65 Cal.2d 349, 362-363, 55 Cal.Rptr. 23 (1966)), but *Rice (Corsetti)*, (supra), eliminated that protection. However, the Supreme Court in *Rice, (Corsetti)*, took care to point out that its objection was not to "protection", but to the method used:

"Finally, we find persuasive the argument that there are other means to achieve the fundamental goals of price maintenance laws without running afoul of the Sherman Act. Thus, our laws prohibit sale of any product as a 'loss leader' (Bus. & Prof. Code § 17044) and licensees may not offer any premium or gift in connection with the sale of alcohol (§ 25600) . . ." 21 Cal.3d at 458.

<sup>3</sup>Price wars have already begun in the retail liquor market[,] (Declaration of Mandella, p. 5), with the problems of unfair sales practices such as loss leaders and general price cutting. Intervenor's members' ability to litigate claims against such practices will thus be directly and immediately affected by this Court's ruling on price posting and the restraining order issued on August 29, 1978.

The key to enforcement and thus the protection afforded by these laws, referred to by the *Rice, (Corsetti)* court, however, is in the proof of cost. Bus. & Prof. Code §§ 17040, 17041, 17043, 17044, 17045, 24755(g), 24877, 25600. Further, proof of costs gives rise to presumptions regarding intent to violate the Unfair Practices Act. Bus. & Prof. Code §§ 17026-17029, 17071, 17071.1, *Dooley's Hardware Mart v. Food Giant Markets, Inc.*, 1 Cal.App.3d 105, 107-108, 81 Cal.Rptr. 451 (1969). It is the difficulty of proving the requisite intent that has made the Unfair Practices Act difficult to enforce. *Wilke & Holzheiser, Inc. v. Dept. of Alcoholic Bev. Control*, (supra), 65 Cal.2d at 362-362 [explaining why the Alcoholic Beverage Control Act required consumer minimum prices and price posting]. Without proof of intent, even the clearest unfair practices cases break down. See, e.g., *Dooley's Hardware Mart v. Food Giant Markets, Inc.*, 21 Cal.App.3d 513, 516-519, 98 Cal. Rptr. 543 (1971); *Tri-Q, Inc. v. Sta-Hi Corp.*, 63 Cal.2d 199, 45 Cal.Rptr. 878 (1965); *William Inglis & Sons Bak. Co. v. ITT-Continental Baking Co.*, 389 Fed.Supp. 1334 (C.D. Cal. 1975).

Without the posting of the prices at which the wholesaler is selling to the retailer the basic, though unsatisfactory, means of discovering whether predatory or discriminatory practices have been engaged in by wholesalers would be to institute litigation and engage in discovery. Proof of costs, even to secure a preliminary injunction (where the requisite quantum of proof is comparatively low) would undoubtedly take extensive, thorough and costly discovery. *Inglis* (supra), 389 Fed.Supp. at 1338.

With posted prices, however, sales practices are readily apparent. In the event of discriminatory pricing or sales below cost (Bus. & Prof. Code §§ 17040, 17043, 17044, 17045, 24755(g), 24877) the presumptions of Bus. & Prof. Code §§ 17026, 17071, and 17071.1 are readily invoked. Further, the mere publication of the posted prices would act as a deterrent to misconduct because of the ease of detection of violations of unfair practices prohibitions.

An adverse decision on the price posting provisions of §§ 24862 and 24866, thus, would deprive intervenor's members of significant protections in the marketing of wine. An adverse decision would undoubtedly be construed by some as invalidating Bus. & Prof. Code §§ 25000 and 24756 which require posting for beer and distilled spirits. Intervenor's members would lose very significant protections from predatory and monopolistic practices that the law presently affords them; protections that are proper and necessary especially because of the sui generis nature of the alcoholic beverages industry. *Wilke & Holzheiser, Inc. v. Dept. of Alcoholic Bev. Control* (supra), 65 Cal.2d at 362-363, esp. fn. 9.

The judgment sought herein will also directly affect intervenor's members to the extent that it upholds or invalidates resale price maintenance at the consumer level in the sale of wine. *Rice, (Corsetti)* (supra), dealt only with § 24755, subsections (a) through (f) which do not apply to wine. Intervenor is prepared to argue that the decision in *Rice, (Corsetti)* is contrary to the decisions of the U. S. Supreme Court (decisions which are controlling on the exclusively federal questions involved. *United States Constitution*, Art. VI, § 2.)

Resale price maintenance provisions control the prices at which intervenor's members buy and sell wine. Resale price maintenance provisions also have a direct impact on the profitability of intervenor's members' businesses. Without it the value of licenses held by intervenor's members has been drastically reduced. (Declaration of Mandella.)

Quite apart from the controlling effect (or absence of such effect) of the decision in *Rice, (Corsetti)*, that case points up another reason for granting leave to intervene. That reason is that respondent herein appears to be a reluctant litigant. Respondent did not seek U. S. Supreme Court review of the decision in *Rice, (Corsetti)*, although the opinion was premised exclusively on federal law. (Indeed, the opinion was premised almost exclusively on recent decisions of the U. S. Supreme Court thus making it an apt candidate for review.) (See Declaration of Mandella.)

Note also that the exhibits attached to the petition for mandate on file herein show that respondent is continuing to enforce the sections at issue here only because the *Rice, (Corsetti)* decision did not purport to reach them (Exhibit "A" attached to Petition, herein) and because *California Constitution*, Art. III, § 3.5 (added by Proposition 5, June 1978 ballot) apparently bars the respondent from invalidating them. See also the decision of the Alcoholic Beverage Control Appeals Board in *Capiscean Corp.* attached to the petition on file herein. Further, it appears that the respondent did not object to the temporary restraining order issued herein despite detrimental and prejudicial effects. (See Section II, infra.)

Intervenor strongly objects to the apparent view of the respondent that *Rice, (Corsetti)* (supra), applies to the price posting requirement at the wholesale to retail level. Intervenor also objects to the respondent's view that *Rice, (Corsetti)* was correctly decided. (Indeed, as shown in Section II(B), infra, the decision appears to be contrary to recent, pertinent rulings of the United States Supreme Court.)

Intervenor respectfully urges that intervention is required here in order to fully protect the rights of intervenor's members from the direct and detrimental effect of a decision of this Court upholding the contentions of petitioner MIDCAL ALUMINUM, INC.

• • •

Dated: September 7, 1978.

[Signature Omitted In Printing]

### EXHIBIT A

#### DECLARATION OF VICTOR J. MANDELLA

I, Victor J. Mandella, declare:

1. That I am the President of the California Retail Liquor Dealers Association, a corporation, which is seeking intervention in *Midcal Aluminum, Inc. v. Baxter Rice*, 3 Civil 17992.

2. The California Retail Liquor Dealers Association is composed of approximately 3,000 member licensees who are owners and operators of independent liquor stores in California selling alcoholic beverages at retail for consumption off the premises. Of the approximately 10,000 licenses issued for retail sale of alcoholic beverages, several thousand are held by a few large retail chains. Our association is composed of approximately one-half of the remaining licensees. Approximately two-thirds of our members are located in Southern California in the marketing area serviced by Midcal Aluminum, Inc., a wholesale wine distributor, which is the distributor for all but an insignificant amount of Gallo wine products in Southern California. Our Southern California members purchase from Midcal Aluminum and are directly affected by the actions taken by it and by this litigation.

3. The California Retail Liquor Dealers Association exists to serve the interests of persons engaged in the sale of alcoholic beverages at retail in the State of California. The Association is devoted to supporting the economic interests of its members through both legislative activity and litigation on behalf of its members in the alcoholic



beverages field. The members of our association, as well as the other independent alcoholic beverage retailers, built their businesses and made their investments based upon the existence of a marketing system for alcoholic beverages which included both a system of consumer price maintenance and a system of price posting of wholesale to retail prices. The businesses of thousands of retail liquor licensees thus depends on the continuation of a marketing system that minimizes and prevents predatory and monopolistic practices that tend to destroy competition.

4. I am advised that the action filed by Midcal Aluminum, Inc., involves both the posting of the prices at which wine is sold from wholesale to retail, and also the posting of the wine consumer price. Wine constitutes a substantial part of the sales of the typical off-sale package store in California, typically averaging more than 25% of the total gross sales of alcoholic beverages in the typical store. The E. & J. Gallo Winery of Modesto, for which Midcal Aluminum is the basic Southern California distributor, has a market dominance in California which is reputed to be in excess of one-third of the California wine market. The sale of wine in California is becoming an increasingly larger percentage of the total sales of alcoholic beverages and the sales are basically of California produced wine.

5. Our association was first made aware of the pending litigation in this matter on Thursday, August 30, 1978, at which time we learned that an order restraining the Department of Alcoholic Beverage Control from proceeding on an accusation against Midcal Aluminum, Inc., for violation of Section 24862 of the Alcoholic Beverage Control Act had been issued and that the Department of Alcoholic Beverage

Control had been further restrained from enforcing Chapter 11 of Division 9 of the Alcoholic Beverage Control Act and specifically Sections 24862 and 24866 as to Midcal Aluminum. On behalf of the California Retail Liquor Dealers Association, I instructed our attorney to take immediate and appropriate legal action to protect the interests of the members of the association in maintaining the validity of Chapter 11 of Division 9 of the Alcoholic Beverage Control Act.

6. The provisions of Chapter 11 of the Alcoholic Beverage Control Act are of vital concern and importance to all retail off-sale licensees in California since the provisions of Section 24862 which require the posting of the price from the wholesaler to the retailer provide the means for the retailer to determine what price he is being charged, as well as what charges are being made to his competitors to assure that he is not being illegally or unfairly discriminated against. The prices thus posted are required by the Alcoholic Beverage Control Act to be published in trade publications. Generally, in Northern California, the prices from wholesaler to retailer are published in the Beverage Industry News and the Southern California prices are published in Pattersons California Beverage Gazetteer. The discounts that are allowed from wholesaler to retailer are likewise required to be disseminated to all retail licensees.

7. Over the years, from time to time, there have been serious problems in regard to discrimination among retailers by wholesalers in the matter of both the prices charged, the quantity discounts, and in some situations,

from time to time, of rebates, free goods and other secret concessions to large retailers. It is necessary to continue to post the price that the wholesaler charges the retailer in order to prevent the discrimination which would otherwise go unnoticed and result in the financial destruction of retailers who were discriminated against in the matter of discounts for quantity purchases.

8. I am advised that discrimination among similarly situated retailers is not only a violation of the California Alcoholic Beverage Control Act, but in certain circumstances could constitute a violation of the federal Robinson-Patman Act. The price posting provisions from wholesaler to retailer also serve a vital function in our marketing system in California to not only allow a retailer to conduct his business in a more efficient and business-like manner, but also to be sure that he is not being illegally discriminated against by the supplier.

9. California is not unique in requiring that the prices charged by the wholesaler to the retailer be posted. To the best of my knowledge there are at least sixteen states that presently require that these wholesale to retail prices be published in connection with the sale of alcoholic beverages. Of these sixteen states, only five require that, additionally, the consumer price be posted. Thus, it appears that in eleven states there has been determined to be a necessary and legitimate basis for the publication of the price from wholesaler to retailer without the additional requirement of a publication of the retailer to consumer price.

10. All of our members are likewise members of the National Liquor Store Dealers Association, and in that capacity have access to much additional information as to

practices, discriminations and the day-to-day operation of the administration of the Alcoholic Beverage Control Acts in other states, and would thus be able to supply the Court with additional information if necessary.

11. Since the loss of the consumer price maintenance provisions relating to distilled spirits and beer in June of this year as a result of the case of *Rice vs. Alcoholic Beverage Control Appeals Board (Corsetti)*, there have been widespread price wars in California. There has been extensive price advertising, loss leader sales, bargain sales, and other price cutting practices, all with an adverse impact on the profitability of our members' businesses. The value of off-sale retail licenses has been drastically reduced and, in many instances, it is virtually impossible to sell such a license. With the price posting provisions, from wholesale to retail, that we currently have in the Alcoholic Beverage Control Act it has often been true that many of the large, chain retailers have adhered to a cut-rate price that appears to represent at least six percent over the cost of acquisition of the alcoholic beverages involved. Without a publication of the prices from wholesaler to retailer there would be no way to determine what that cost of acquisition was. Thus, even in the chaotic market that exists under the loss of the price maintenance provisions due to the *Corsetti* case, there still is a justification for the wholesale to retail price posting, both to prevent discrimination among similarly situated retailers, and to tend to prevent sales in violation of the California Unfair Practices Act.

12. I am advised that the only party defendant to this action is the Director of the Department of Alcoholic

Beverage Control. After the *Corsetti* case became final in June of 1978, and especially in the month of July 1978, the present Director of Alcoholic Beverage Control indicated on several occasions that he was enforcing the price posting provisions, i.e., from wholesaler to retailer, because the *Corsetti* case had not specifically ruled on the validity of those sections, and that he felt that a judicial determination was necessary. The Director's position is further demonstrated by Exhibits "A" and "B" attached to the Mideal Aluminum, Inc., petition herein.

13. The California Retail Liquor Dealers Association was not a party to the *Corsetti* case, nor was any other retailer in California a party to that case. The only party defending the price maintenance provisions of the Alcoholic Beverage Control Act involving distilled spirits and beer, at the retailer to consumer level, being the present Director of the Department of Alcoholic Beverage Control. After the Supreme Court declared the invalidity of Section 24755, our association requested on several occasions that the Director of Alcoholic Beverage Control appeal the Supreme Court's decision to the United States Supreme Court since we were advised that the *Corsetti* case was decided on federal grounds. The Director declined to do so. In any event, the *Corsetti* case has left the retail package store owners in California without their first line of defense against the predatory and monopolistic practices of giant retailers, and has thus made it vital that the price posting provisions of Section 24862, relating to the posting of the price at which a wholesaler is selling the wine to a retailer, be retained to retain some semblance of an orderly market. It is likewise vital that the price posting provisions

found in the Alcoholic Beverage Control Act relating to distilled spirits and beer also be retained.

14. The California Retail Liquor Dealers Association is not neutral on the question of the interpretation or intent of Section 24862 of the Alcoholic Beverage Control Act, nor on the intent and meaning of all of the sections contained in Chapter 11 of the Alcoholic Beverage Control Act relating to wine price posting. The association will emphatically and vigorously contend for the validity of the sections involved in the petition for writ of mandate herein.

15. As a retailer of some products other than alcoholic beverages in my store, I can say that although most industries do not publish the price list from wholesaler to retailer in an industry-wide publication such as the Beverage Industry News, or Pattersons California Beverage Gazetteer, many of the wholesalers that I do business with do supply price lists that are available to all retailers which set forth the prices at which the product can be purchased from the wholesaler. These lists are not used, to my knowledge, for any purposes other than to inform the retailer as to the price at which he can purchase the items from the wholesaler and to also give him some kind of a check on whether or not his retail competitors are being given a discriminatory price advantage.

16. It is vital that our association be allowed to intervene in this action to present a vigorous defense to the allegations of invalidity of the sections of the Alcoholic Beverage Control Act involved, since there is no one else a party to the action that has such a direct and vital interest in maintaining the validity of the sections involved.



Without the Alcoholic Beverage Control Act sections involved, undetectable discrimination among retailers by wholesalers will result in further great financial loss to many independent retailers. Our members and our association are in a position to furnish the Court with basic data and factual material, both from California and other states, that go to the very heart of the marketing system which is being challenged in this petition.

17. The temporary restraining order issued in this case restraining the Director of Alcoholic Beverage Control from enforcing the provisions of Chapter 11 of the Alcoholic Beverage Control Act against the distributor of the product of the dominant market force in the California wine market, namely Gallo, places all other wholesale distributors in an unequal position and allows this distributor to deal with retailers as to wholesale to retail price and discounts without any effective means of determining whether it is discriminating as among retailers. Investigation by our association reveals that E. & J. Gallo Winery, the producer of Gallo wines, has taken the position that neither it nor its wholesale distributors are required to post the wholesale to retail price as a result of the decision in the *Corsetti* case and apparently neither is in fact posting such prices. We also learned that of the six shareholders that own Dry Creek Corp., which in turn owns E. & J. Gallo Winery, four of them are the sole shareholders of Midcal Aluminum, Inc. It therefore appears that at least in the Southern California market, Midcal Aluminum, Inc., is in a favorable position to insist that E. & J. Gallo Winery comply with the statutory requirement of posting the prices of Gallo wine from wholesale

to retail. To stay the enforcement of the price posting provisions against Gallo's distributor is likewise giving an unfair competitive advantage to the dominant force in the Southern California wine market. The order appears to be unfair to other Southern California wholesale wine distributors and also to Southern California retailers. I would therefore urge this Court to modify the restraining order to allow the Director to enforce the sections involved against Midcal Aluminum, Inc., and to allow that part of the order which restrains the Department from proceeding with the accusation against Midcal Aluminum, Inc., to stand until a final court determination of the issues raised in the petition herein.

18. I respectfully urge this Court, on behalf of all of the members of our association, to allow us to intervene in this proceeding in order to fully protect our rights and businesses.

I declare, under penalty of perjury, that the foregoing is true and correct, and that I have personal knowledge of the matters contained herein, and that if called as a witness I could personally testify to such matters.

Executed on September 6, 1978, at Sacramento, California.

[Signature Omitted in Printing]

In the  
Court of Appeal of the State of California  
in and for the  
Third Appellate District  
3 Civil 17992

[ORDER]

[Filed Sept 22, 1978]  
Mideal Aluminum, Inc.

v.

Baxter Rice

By the Court:

The stay order issued by this court on August 29, 1978, is discharged.

Good cause appearing, respondent is hereby commanded forthwith to cease, desist and refrain from any further action on the accusation against petitioner filed August 15, 1978. Respondent is also ordered to refrain from any further action in enforcing the wine price-posting provisions of the Alcoholic Beverage Control Act, to wit, Section 24850, et seq., and more particularly, Sections 24862 and 24866 of the Business and Professions Code, and the regulations promulgated pursuant thereto, and more particularly, Rule 101 Chapter 1, Title 4, California Administrative Code, as to any licensee insofar as they require wine wholesalers to post the minimum retail prices at which wines may be sold to the public, until further order of this court. In other respects, petitioner's request for a stay order is denied.

Dated: September 22, 1978.

/s/ PUGLIA

Puglia, P. J.

\* \* \*

In the  
Court of Appeal of the State of California  
in and for the  
Third Appellate District  
3 Civil 17992

[ORDER]

[Filed Sept. 22, 1978]

Mideal Aluminum, Inc.

v.

Baxter Rice

By the Court:

Let an alternative writ of mandate issue. Respondent's and intervenor's written returns are to be served and filed on or before October 12, 1978. Petitioner's replication, if any, is to be served and filed within 15 days after the filing of the returns.

Dated: September 22, 1978

Puglia, P. J.

\* \* \*

In the  
Court of Appeal of the State of California  
in and for the  
Third Appellate District  
3 Civil 17992

Midcal Aluminum, Inc., a California  
corporation,

Petitioner,

v.

Baxter Rice as Director of the Depart-  
ment of Alcoholic Beverage Control of  
the State of California,

Respondent,

California Retail Liquor Dealers Associa-  
tion, a California corporation,

Intervenor.

#### ALTERNATIVE WRIT OF MANDATE

To BAXTER RICE as Director of the Department of  
Alcoholic Beverage Control of the State of California,  
Respondent and California Retail Liquor Dealers Associa-  
tion, a California corporation, Intervenor:

WHEREAS, MIDCAL ALUMINUM, INC., a Calif.  
corp, petitioner herein, has filed its duly verified  
petition for writ of mandate and it appearing to this  
Court that petitioner herein had no other plain, speedy

or adequate remedy at law and that the relief prayed  
for herein should be granted;

NOW, THEREFORE, you the said Baxter Rice as  
Director of the Department of Alcoholic Beverage Con-  
trol of the State of California, Respondent, are hereby  
commanded forthwith to grant the relief prayed for  
in this petition and indicate to this Court that you have  
done so or that you show cause in writing on or before  
October 12, 1978, why you have not done so and why  
the relief prayed for in this proceeding should not be  
granted.

WITNESS THE HONORABLE ROBERT K.  
PUGLIA, Presiding Justice of the Court of Appeal of  
the State of California, in and for the Third Appellate  
District.

[Attestation and Seal Omitted in Printing]



In The  
Court of Appeal of the State of California  
in and for the  
Third Appellate District  
3 Civil 17992  
[ORDER]  
[Filed September 28, 1978]  
Midcal Aluminum, Inc.  
v.  
Baxter Rice

By the Court:

The stay order issued by this court on September 22, 1978, is discharged.

Good cause appearing, respondent is hereby commanded forthwith to cease, desist and refrain from any further action on the accusation against petitioner filed August 15, 1978. Respondent is also ordered to refrain from any further action in enforcing the wine price-posting provisions of the Alcoholic Beverage Control Act, to wit, Section 24850, et seq., and more particularly, Sections 24862 and 24866 of the Business and Professions Code, and the regulations promulgated pursuant thereto, and more particularly, Rule 101 Chapter 1, Title 4, California Administrative Code, as to any licensee insofar as they require the posting of minimum retail prices at which wines may be sold to the public, until further order of this court. In other respects, petitioner's request for a stay order is denied.

Dated: September 28, 1978.

Puglia, P. J.

\* \* \*

In The  
Court of Appeal of the State of California  
in and for the  
Third Appellate District  
3 Civil 17992  
Sacramento

[ORDER]  
[Filed April 19, 1979]  
[Midcal] Aluminum, Inc.

v.  
Baxter Rice

By the Court:

Intervenor's petition for rehearing is denied.

Dated: April 19, 1979.

PUGLIA, P. J.

\* \* \*

In The  
Court of Appeal of the State of California  
in and for the  
Third Appellate District  
3 Civil 17992

[ORDER]

[Filed July 19, 1979]

[Midcal] Aluminum, Inc.

v.

Baxter Rice

By the Court:

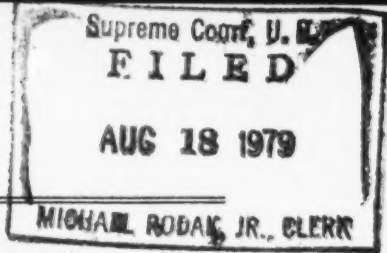
Intervenor's request to extend stay order of June 27, 1979,  
is granted. Issuance of the peremptory writ of mandate is  
stayed pending further order of this court.

Dated: July 19, 1979.

/s/ REGAN

Regan, Acting P. J.

\* \* \*



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**In the Supreme Court**  
OF THE  
**United States**

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OCTOBER TERM, 1979

---

**No. 79-97**

---

CALIFORNIA RETAIL LIQUOR DEALERS ASSOCIATION,  
a California corporation,  
*Petitioner*

VS.

MIDCAL ALUMINUM, INC., a California corporation,  
*Respondent*

BAXTER RICE as Director of the Department of  
Alcoholic Beverage Control of the State of California  
*Respondent*

---

**BRIEF IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI  
to the Court of Appeal of the State of California  
in and for the Third Appellate District**

---

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## SUBJECT INDEX

	<u>Page</u>
Questions presented .....	1
Statement of the case .....	2
Argument .....	7

### I

The State Court decision is not contrary to decisions of this court defining the scope of the State's authority to regulate alcoholic beverages within a State's borders under the Twenty-First Amendment .....	7
---	---

### II

California Business and Professions Code Sections 24862 and 24866, which require the posting of resale prices for wines, violate the Sherman Antitrust Act and are not insulated therefrom by the State action exemption .....	25
--	----

### III

Petitioner has failed to present sufficient grounds to justify the granting of writ of certiorari .....	34
A. The Rice decision has created no uncertainty or confusion in California .....	34
B. Other states .....	37
Conclusion .....	38

## TABLE OF AUTHORITIES CITED

Cases	Page
Adams v. American Bar Association 400 F.Supp. 219 (D.C. N.J. 1975) .....	22
Allied Properties v. Department of Alcoholic Beverage Control 53 Cal.2d 141, 346 P.2d 737 (1959) .....	36
Bates v. State Bar of Arizona 433 U.S. 350, 97 S.Ct. 2691 (1977) .....	31, 32
California v. LaRue 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972) .....	14, 15, 16, 17, 18
Cantor v. Detroit Edison Co. 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976) .....	31, 33
Capiscean Corporation v. Alcoholic Beverage Control Appeals Board, 87 Cal.App.3d 996, 151 Cal.Rptr. 492 (1979) .....	5, 35
Clark v. City of Fremont, Nebraska 377 F.Supp. 327 (D.C. Neb. 1978) .....	15
Cooley v. Board of Wardens 12 How. 299, 13 L.Ed. 996 (1951) .....	20
Costa v. Bluegrass Turf Service, Inc. 406 F.Supp. 1003 (E.D. Ky. 1975) .....	14
Craig v. Boren 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976) .....	11, 12, 13, 15, 19
Currin v. Wallace 306 U.S. 1, 59 S.Ct. 379, 83 L.Ed. 441 (1939) .....	29
Dr. Miles Medical Co. v. John D. Park & Sons Co. 220 U.S. 373, 31 S.Ct. 376, 55 L.Ed. 502 (1910) .....	27
E. J. Delaney Corp. v. Bonne Bell, Inc. 525 F.2d 296 (C.A. Colo. 1975) .....	22
Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc. 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961) .....	27
Epstein v. Lordi, 261 F.Supp. 921 (D.C. N.J. 1966); aff'd 389 U.S. 29, 88 S.Ct. 106, 19 L.Ed.2d 29 (1967) .....	20, 21
Goldfarb v. State Bar of Virginia 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975) .....	30
Gordon v. New York Stock Exchange, Inc. 422 U.S. 659, 95 S.Ct. 2598, 45 L.Ed.2d 463 (1975) .....	22
Hampton, Jr., & Co. v. United States 276 U.S. 394, 48 S.Ct. 348, 72 L.Ed. 624 (1928) .....	29
Hanf v. United States 235 F.2d 710 (8th Cir., 1956) .....	14
Hostetter v. Idlewild Bon Voyage Liquor Corporation 377 U.S. 324, 84 S.Ct. 1293, 12 L.Ed.2d 350 (1964) .....	9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23
In the Matter of William J. Mezzetti Associates, Inc. v. State Liquor Authority 410 N.Y.S.2d 893 (1978) .....	37

## TABLE OF AUTHORITIES CITED

CASES	Page
Jameson & Co. v. Morgenthau 307 U.S. 171, 59 S.Ct. 804, 83 L.Ed. 1189 (1939) .....	8
Joseph E. Seagram & Sons, Inc. v. Hostetter 384 U.S. 35, 86 S.Ct. 1254 (1966) .....	10, 14, 16, 17, 18, 24
Kelly v. State of Washington 302 U.S. 1, 58 S.Ct. 87, 82 L.Ed. 3 (1937) .....	20
Lamp Liquors, Inc. v. Adolph Coors Co. 563 F.2d 425 (10th Cir., 1977) .....	13, 14, 23
National Railroad Passenger Corporation v. Miller 358 F. Supp. 1321 (D.C.Kan. 1973) .....	14, 18, 19, 20
Northern P. R. Co. v. United States 356 U.S. 1, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958) .....	22
Parker v. Brown 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943) .....	4, 28, 29, 30, 31, 32, 33, 34
Rice v. Alcoholic Beverage Control Appeals Board 21 Cal.3d 431, 146 Cal.Rptr. 585, 579 P.2d 476 (1978) .....	passim
Sail'er Inn, Inc. v. Kirby 5 Cal.3d 1, 95 Cal.Rptr. 329, 485 P.2d 529 (1971) .....	7, 8, 23
Samson Market Co. v. Alcoholic Beverage Control Appeals Board 71 Cal.2d 1215, 81 Cal.Rptr. 251, 459 P.2d 667 (1969) .....	36
Schwegmann Bros. v. Calvert Distillers Corp. 341 U.S. 384, 71 S.Ct. 745, 95 L.Ed. 1035 (1951) .....	22, 26, 27
State Board of Equalization of California v. Young's Market 299 U.S. 59, 81 L.Ed. 38, 57 S.Ct. 77 (1936) .....	9
United Mine Workers v. Pennington 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965) .....	27, 28
United States v. Frankfort Distilleries 324 U.S. 293, 65 S.Ct. 661, 89 L.Ed. 951 (1944) .....	8, 17
United States v. State Tax Commission of Mississippi 412 U.S. 363, 93 S.Ct. 2183, 37 L.Ed.2d 1 (1973) .....	23
Vintage Imports Ltd. v. Joseph E. Seagram & Sons, Inc. 409 F.Supp. 497 (D.C. Va., 1976) .....	15
White v. Fleming 522 F.2d 730 (7th Cir. 1975) .....	14, 16
Wickard v. Filburn 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942) .....	29
Wilke & Holzheiser, Inc. v. Dept. of Alcoholic Beverage Control 65 Cal.2d 349, 55 Cal.Rptr. 23, 420 P.2d 735 (1966) ..	36
Wisconsin v. Constantineau 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971) .....	11, 13

### Constitutions

	<u>Page</u>
California Constitution, Art. III, Section 3.5 .....	5, 35, 36
United States Constitution:	
First Amendment .....	15
Twenty-First Amendment .....	1, 4, 7, 8, 9, 10, 11, 12, 13, 14, 15, 18, 21, 23, 28
Twenty-First Amendment, Section 2 .....	7, 19
Article I, Section 8, Subdivision (3) .....	9, 18

### Statutes

California Business and Professions Code:	
Section 23000 et seq. (Alcoholic Beverage Control Act) .....	2, 6, 30, 32, 36
Section 24750.5 .....	3
Section 24755 .....	2, 3, 4, 5, 7
Section 24755(a) .....	2, 3
Section 24755(c) .....	2, 3
Section 24755(f) .....	2
Section 24756 .....	2, 3
Section 24862 .....	3, 5, 7, 23, 25, 34
Section 24866 .....	3, 5, 7, 23, 25, 34
Agricultural Prorate Act .....	29
Federal Alcohol Administration Act (27 U.S.C. Section 205) ..	8
Kansas Liquor Control Act .....	18
McGuire Act (66 Stat. 632) .....	24, 26, 27
Miller-Tydings Act (50 Stat. 693) .....	24, 26, 27
Sherman Antitrust Act .....	passim
15 U.S.C. Section 1 .....	4, 13, 26
15 U.S.C. Section 2 .....	13
Webb-Kenyon Act (27 U.S.C. Section 122) .....	18
Cal. Stats. 1975, Ch. 402, p. 878 .....	24, 25
Ch. 708, Section 880, 1979 Laws of Hawaii .....	25, 37
New York Stats., Ch. 531, Section 906 .....	16

### Other Authorities

California Senate Select Committee Report on Laws Relating to Alcoholic Beverages Vol. I, p. 9 (1974) .....	22
Dunsford, State Monopoly and Price-Fixing in Retail Liquor Distribution, Wis.L.Rev. 454 (1962) .....	24
Sen. Select Com. Rep. on Laws Relating to Alcoholic Bever- ages, Vol. 3, p. 69 (1974) .....	24
U.S. Code Cong. & Admin. News, pp. 1569-1572 (1975) .....	24

## In the Supreme Court

OF THE

### United States

OCTOBER TERM, 1979

No. 79-97

CALIFORNIA RETAIL LIQUOR DEALERS ASSOCIATION,  
a California corporation,  
*Petitioner*

vs.

MIDCAL ALUMINUM, INC., a California corporation,  
*Respondent*

BAXTER RICE as Director of the Department of  
Alcoholic Beverage Control of the State of California  
*Respondent*

**BRIEF IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI  
to the Court of Appeal of the State of California  
in and for the Third Appellate District**

### QUESTIONS PRESENTED

1. Does the Twenty-first Amendment immunize conduct otherwise prohibited by the Sherman Act, so as to permit the California Department of Alcoholic Beverage Control to enforce statutes requiring wine growers to post absolute prices at which a California wholesaler must sell to a California retailer, and minimum prices at or above which a California retailer must sell to a consumer for off-premises consumption?

2. Are California statutes which require wine growers to post absolute prices at which California wholesalers



must sell to California retailers, and minimum prices at or above which California retailers must sell to consumers for off-premises consumption invalid under the Sherman Antitrust Act?

3. Does the state action exemption insulate from the prohibitions of the Sherman Act a statutory scheme by which wine growers, subject to no control or review by the state, are required to dictate the prices at which California wholesalers must sell to California retailers and minimum prices at or above which California retailers must sell to consumers for off-premises consumption?

#### STATEMENT OF THE CASE

California has codified a comprehensive statutory scheme to regulate the alcoholic beverage industry in California (California Business and Professions Code Section 23000 et seq., known as the Alcoholic Beverage Control Act). A significant portion of the Act is aimed at promoting orderly marketing conditions and regulating the sale of alcoholic beverages. Primary reliance is placed on the use of fair trade contracts and posting of prices with the Department of Alcoholic Beverage Control.

The sale and resale of distilled spirits are governed primarily by sections 24755 and 24756 of the California Business and Professions Code. Section 24755 requires a brand owner to file monthly with the Department of Alcoholic Beverage Control a minimum retail price schedule for distilled spirits bearing the name of the brand owner (subdivisions (a) and (c)). Subdivision (f) provides that no licensee shall sell a package of distilled spirits for consumption off premises at a price less than the effective

price filed with the Department in accordance with subdivisions (a) and (c).

Pursuant to Sections 24755 and 24756, distilled spirits and brandy manufacturers and wholesalers must file with the Department of Alcoholic Beverage Control a price list showing the prices at which their distilled spirits are sold to retailers. That section further provides that sales to retailers must be in compliance with such price lists.

Wine prices may be set by wine growers either by means of a fair trade contract (Business and Professions Code Section 24750.5) or by filing an effective price schedule with the Department of Alcoholic Beverage Control. Such schedule shall contain prices at which the wholesaler shall sell to the retailer, and minimum prices at which the retailer may sell to the consumer (Business and Professions Code Section 24866).

Section 24862 provides that no licensee shall sell or resell to a retailer, nor shall a retailer purchase, any item of wine except at the listed price or at the price contained in a fair trade contract. Section 24862 further provides that a licensee may not sell to a consumer at a price less than that contained in a fair trade contract or posted with the Department of Alcoholic Beverage Control.

In *Rice v. Alcoholic Beverage Control Appeals Board*, 21 Cal.3d 431, 146 Cal.Rptr. 585, 579 P.2d 476 (1978), the California Supreme Court declared the price maintenance provisions contained in California Business and Professions Code Section 24755 invalid. In *Rice*, a retailer was accused of selling various packages of distilled spirits at prices below the posted minimum consumer price. Follow-

ing an evidentiary hearing, the Department suspended the retailer's license for 10 days. The retailer appealed the decision to the Alcoholic Beverage Control Appeals Board, arguing, *inter alia*, that Section 24755 violated the Sherman Antitrust Act (15 U.S.C. Section 1) and was therefore invalid. The Board agreed, and reversed the decision of the Department. The Department then appealed the decision of the Board.

The California Supreme Court undertook an exhaustive review of the Sherman Act, the Twenty-first Amendment, and the inter-relationship between those two provisions. The Court held that resale price maintenance provisions contained in Business and Professions Code Section 24755 contravened the Sherman Act, and were not insulated therefrom by the so-called "state action" exemption first announced in *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). The Court further held that the Twenty-first Amendment does not prevent the application of the Sherman Act prohibition to the price fixing of distilled spirits. The Court balanced the policies underlying the Sherman Act against the stated goals of the price maintenance statutes (i.e., temperance and orderly marketing conditions) and found that while there is a clear national trend against fair trade laws, the effectiveness of California's liquor price maintenance provisions in achieving their stated goals was doubtful. Thus, the California Supreme Court declared the price maintenance provisions invalid.

Shortly after the *Rice* decision, the California electorate, through the initiative process, approved an amendment to the California Constitution which prohibits an administra-

tive agency from declaring a statute unenforceable until an appellate court has so held. (California Constitution, Art. III, Section 3.5, approved June 6, 1978.) Alluding to that provision, the director announced that because Section 24755 dealt only with minimum consumer price filings for distilled spirits and beer, other price filing requirements of California law would continue to be enforced, including the wine resale price maintenance provisions of Sections 24862 and 24866, described above.

The constraints cited by the director also impacted upon the Alcoholic Beverage Control Appeals Board. In a case arising subsequent to *Rice*, a licensee appealed a decision of the Department which had imposed disciplinary action pursuant to a finding that the licensee had sold wines below the minimum consumer prices. In reviewing the findings of the Department, the Board stated that while the *Rice* decision appeared applicable to Business and Professions Code Section 24862, California Constitution, Art. III, Section 3.5 prohibited the Board from declaring that provision invalid. Subsequently, the matter was appealed to the California Court of Appeal, First Appellate District, where Section 24862 was declared invalid as it pertains to minimum consumer resale prices. (*Capiscean Corporation v. Alcoholic Beverage Control Appeals Board*, 87 Cal.App.3d 996, 151 Cal.Rptr. 492 (1979)).

On August 15, 1978, an Accusation was filed against Respondent Midcal Aluminum, Inc., alleging that Respondent sold items of bottled wine to retailers in California at other than prices posted by the brand owner, or for which no prices had been posted by the brand owner. Respondent entered into a stipulation dated August 15,

1978, in which Respondent admitted to the truthfulness of the facts set forth in the Accusation, and further agreed that the Department of Alcoholic Beverage Control could, subject to a judicial determination of the validity of the wine price posting provisions, impose a monetary penalty or suspension of Respondent's licenses as provided in the Alcoholic Beverage Control Act.

Respondent thereupon filed in the California Court of Appeal, Third Appellate District, a timely Petition of Writ of Mandate. The relief sought therein included a dismissal of the Accusation and an Order of that Court enjoining further enforcement of the wine price posting statutes and regulations promulgated thereunder, as well as a judicial determination that the statutes are invalid and unconstitutional. The Court held that the statutes relating to resale price maintenance of wine were substantially similar to the statutes relating to price maintenance of distilled spirits found to be invalid in *Rice*. Further, the Court found no significant difference between resale price maintenance at the wholesale level and resale price maintenance at the retail level.

Following the decision of the Court of Appeal, Petitioner herein, Intervenor below, filed a Petition for Rehearing, which was denied April 19, 1979. Petitioner then sought review by the California Supreme Court, which denied Petitioner's Petition for hearing on May 24, 1979.

## ARGUMENT

### I

#### **The State Court Decision Is Not Contrary to Decisions of This Court Defining the Scope of The State's Authority to Regulate Alcoholic Beverages Within a State's Borders Under The Twenty-First Amendment**

Petitioner argues that the Twenty-first Amendment insulates the price fixing provisions of California Business and Professions Code Sections 24862 and 24866 from the prohibitions of the Sherman Act. This contention is based upon Section 2 of the Twenty-first Amendment, which provides:

"The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof is prohibited."

In *Rice v. Alcoholic Bev. etc. Appeals Bd.*, 21 Cal. 3d 431, 146 Cal.Rptr. 585, 579 P.2d 476 (1978), the California Supreme Court, in declaring the related retail price maintenance provisions of California Business and Professions Code Section 24755, and its implementing regulations, invalid as violative of the Sherman Antitrust Act, ruled that the Twenty-first Amendment does not give the states plenary powers over all matters relating to alcoholic beverages. Citing United States Supreme Court decisions, and its own recent decision in *Sail'er Inn, Inc. v. Kirby*, 5 Cal.3d 1, 95 Cal.Rptr. 329, 485 P.2d 529 (1971), the California Supreme Court in *Rice* ruled that:

"When a statute enacted pursuant to the Twenty-first Amendment conflicts with an enactment based upon the Commerce Clause, we must balance the



policies furthered by each in order to determine which should prevail." *Id.*, at p. 448.

This balancing test employed by the court in *Rice* and *Sail'er Inn*, and approved by the Third District Court of Appeal and the Supreme Court of California in the present case, is completely consistent with prior decisions of this court, and should be upheld.

Although it is established that the Twenty-first Amendment grants a state significant authority to prohibit or regulate the importation of intoxicants destined for use, distribution or consumption within its borders, it is equally well-established that such authority is not plenary and exclusive, particularly in the area of regulation of the manufacture, traffic and distribution of intoxicants within the borders of the State. See *United States v. Frankfort Distilleries*, 324 U.S. 293, 299, 65 S.Ct. 661, 89 L.Ed. 951 (1944). In *Jameson & Co. v. Morgenthau*, 307 U.S. 171, 59 S.Ct. 804, 83 L.Ed. 1189 (1939), the Court held that, notwithstanding the Twenty-first Amendment, Congress had authority under the Commerce Clause to pass the Federal Alcohol Administration Act, (27 U.S.C. Section 205), which established broad restraints upon both intra-state and interstate liquor commerce. It was contended that the Twenty-first Amendment vested the states with complete and exclusive control over commerce in intoxicating liquors unlimited by the Commerce Clause. The Court summarily rejected this theory with the following blunt response: "We see no substance in this contention." *Jameson & Co. v. Morgenthau*, *supra*, 307 U.S. at pp. 172-173.

Recent United States Supreme Court decisions have recognized this principle in ruling, contrary to Petitioner's contention, that state legislation passed under the authority of the Twenty-first Amendment does not invariably take precedence over conflicting federal law. In *Hostetter v. Idlewild Bon Voyage Liquor Corporation*, 377 U.S. 324, 84 S.Ct. 1293, 12 L.Ed.2d 350 (1964), principally relied upon by the California Supreme Court in *Rice*, this Court clearly articulated the need to consider the Commerce Clause and the Twenty-first Amendment in juxtaposition to determine which should prevail.

In *Hostetter*, a New York retail liquor corporation brought an action to enjoin the New York State Liquor Authority from terminating the corporation's tax-free sales of bottled wines and liquors to international airline passengers for their use at foreign destinations. The state statute imposed a license requirement upon the retailer. It was contended by the retailer that the liquor license requirement imposed by the state regulation was invalid on the ground that the Commerce Clause of the United States Constitution (Article I, Section 8, Subdivision (3)), deprived the state of the authority to enact such a requirement.

The Court noted and summarized the early line of cases commencing with *State Board of Equalization of California v. Young's Market*, 299 U.S. 59, 57 S.Ct. 77, 81 L.Ed. 38 (1936), which generally declared that the states were totally unconfined by traditional Commerce Clause limitations when restricting the importation of intoxicants. A review of *Young's Market* and its progeny led the Court

to the conclusion that such case law was not in keeping with the original intent of the Amendment, and was not dispositive in the matter before the Court. The Court explained:

"To draw a conclusion from this line of decisions that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification. If the Commerce Clause had been pro tanto 'repealed,' then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor. Such a conclusion would be patently bizarre and is demonstrably incorrect." *Hostetter v. Idlewild Bon Voyage Liquor Corporation*, *supra*, 377 U.S. at pp. 331-332. See also *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 42, 86 S.Ct. 1254 (1966).

The *Hostetter* Court continued by articulating the following balancing test to be employed when ruling upon the validity of a state liquor statute which conflicts with the Commerce Clause:

"Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." 377 U.S., at p. 332.

The Court in *Hostetter*, after balancing the policies and interests served by the conflicting federal and state provisions, declared the New York statute unconstitutional. In so ruling, the Court emphasized that the interests of the Twenty-first Amendment were not substantially served by

the state statute because it did not regulate the transportation or importation of liquor into the state. *Id.*, at pp. 332-333.

The ruling in *Hostetter* is extremely persuasive in the present case. In *Hostetter*, as in the case at bench, the state liquor regulation in question governed distribution of intoxicants from within the state, rather than the importation of liquor. The language and ruling of this Court in *Hostetter* clearly indicate that the California Supreme Court in *Rice* properly adopted and applied the balancing test to determine the constitutional validity of a state liquor law which regulated intrastate distribution and sale of intoxicants in a manner inconsistent with the dictates of the Sherman Act.

Decisions of this Court since *Hostetter* have consistently recognized that the Twenty-first Amendment is not a panacea which works to render all state liquor laws valid. In *Wisconsin v. Constantineau*, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971), the Court was asked to rule on the constitutionality of a Wisconsin statute pursuant to which the plaintiff's name was publicly posted in retail liquor outlets, without prior notice or opportunity to be heard, as one to whom intoxicating beverages should not be sold. The Court declared the statute unconstitutional on procedural due process grounds notwithstanding the police power extended to the state by the Twenty-first Amendment. *Id.*, at p. 436.

Contrary to Petitioner's assertions, *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976), is the most recent expression of the Court's position regarding the

Twenty-first Amendment vis-a-vis the Commerce Clause. In *Craig*, the Court considered an Oklahoma statute which specified different drinking ages for men and women. The appellees argued that the statute concerned the sale and distribution of alcohol, and by force of the Twenty-first Amendment should, therefore, be able to withstand any equal protection challenge.

The Court ruled that that argument lacked merit. It was held that validity must be determined by balancing the policies served by the conflicting laws. Citing *Hostetter*, the Court explained:

"Even here, however, the Twenty-first Amendment does not pro tanto repeal the Commerce Clause, but merely requires that each provision be considered in light of the other, and in the context of the issues and interests at stake in any concrete case." *Craig v. Boren, supra*, 429 U.S. at p. 206.

In adopting and applying this balancing test the Court noted, once again, that the line of cases which granted the states unfettered authority to regulate pursuant to the Twenty-first Amendment, "centered upon importation of intoxicants, a regulatory area where the State's authority under the Twenty-first Amendment is abundantly clear..." *Craig v. Boren, supra*, 429 U.S. at p. 207. In balancing interests, the Court ruled that such an intrastate liquor regulation which infringed equal protection rights could not withstand constitutional scrutiny. *Craig* clearly stands for the proposition that the Twenty-first Amendment does not insulate state liquor laws from constitutional attack, (especially where the state regulation, as in the present case,

is directed primarily at regulating intrastate activities rather than importation.

The Petitioner claims that the decisions in *Wisconsin* and *Craig* were based upon the infringement of fundamental federal rights. Petitioner would limit the balancing test to a situation in which the state law conflicts with such a "fundamental" right. This Court's ruling in *Hostetter*, a case in which no fundamental right was involved, points out the flaw in this argument. While a federal right of "fundamental" character may contribute to balancing in favor of the federal law, it is obviously not a prerequisite to use of the balancing test. The decisions of this Court beginning with *Hostetter* clearly indicate that state liquor laws are not absolutely protected by the Twenty-first Amendment when they offend important federal policies.

A recent federal court decision has similarly interpreted the *Hostetter* line of cases. In *Lamp Liquors, Inc. v. Adolph Coors Co.*, 563 F.2d 425 (10th Cir., 1977), the trial court had dismissed the plaintiff's private antitrust action brought pursuant to the Sherman Antitrust Act (15 U.S.C. Sections 1 and 2) on the ground that the State liquor laws authorized by the Twenty-first Amendment were in conflict with, and took precedence over, the Sherman Act remedies. The federal Circuit Court of Appeals reversed the dismissal. In discussing the effect of the Twenty-first Amendment upon federal antitrust laws, the Court stated:

"The general import of this provision (the Twenty-first Amendment) is to prohibit importation into a state for delivery or use therein of liquor in violation of the laws of the state. Its main purpose then, would appear to have been to give a dry state power to pro-



teet itself from importation of liquor into the state for use therein. *It is also clear that the section does not undertake to approve or disapprove of trade restrictions such as those that are here complained of nor does it seek to authorize the granting of an anti-trust exception or immunity.*" (Emphasis added.) *Lamp Liquors v. Adolph Coors Co.*, *supra*, 563 F.2d at p. 929.<sup>1</sup>

The federal court's ruling in *Lamp Liquors* clearly conforms to Supreme Court decisions in this area, and is persuasive in the present case because it involved an alleged conflict between the Twenty-first Amendment and the Sherman Act, and noted the limited application of the Twenty-first Amendment in non-importation cases. The definitive statement of law which comes from the Supreme Court and federal cases in this area is that state liquor laws afforded protection by the Twenty-first Amendment must be balanced against conflicting federal legislation passed under authority of the Commerce Clause; the Amendment does not insulate such state laws from Commerce Clause attack. See also *White v. Fleming*, 522 F.2d 730 (7th Cir., 1975); *Hanf v. United States*, 235 F.2d 710 (8th Cir., 1956); *Costa v. Bluegrass Turf Service, Inc.*, 406 F.Supp. 1003 (E.D. Ky. 1975).

Petitioner's argument on this issue is based upon three cases, *California v. La Rue*, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972); *Joseph E. Seagram & Sons, Inc. v. Hostetter*, *supra*; and *National Railroad Passenger Corporation v. Miller*, 358 F.Supp. 1321 (D.C.Kan. 1973). None

<sup>1</sup>In *Lamp Liquors*, the Court also went on to rule that no real conflict existed between the state's liquor laws and the Sherman Act. *Id.*, at p. 430.

of these cases are dispositive in this matter. In fact, a thorough examination of the cases reveals that they support the balancing test approach adopted by the California Supreme Court in *Rice*.

In *California v. La Rue*, this Court upheld regulations passed by the California Department of Alcoholic Beverage Control which prohibited sexual entertainment in taverns holding liquor licenses. However, the case did not cast doubt upon the Court's ruling in *Hostetter*, or the need to accommodate and balance. *La Rue* is merely a case in which the balance was struck in favor of the state regulation. In fact, the Court devoted considerable attention to balancing the regulation's infringement on First Amendment rights with the state policies served by the statute. (See *Id.*, at pp. 117-118.) Further, in *La Rue* the Court recognized the balancing test of *Hostetter*. *Id.*, at p. 115. In *La Rue*, the Court also specifically ruled that state liquor regulations are not immunized from constitutional attack by the Twenty-first Amendment.

Subsequent cases have interpreted *La Rue* in the manner suggested above. See *Craig v. Boren*, *supra*, 429 U.S. 190, 208-209, *Clark v. City of Fremont, Nebraska*, 377 F.Supp. 327, 331 (D. Neb., 1974).<sup>2</sup> In *Vintage Imports, Ltd. v. Joseph E. Seagram & Sons, Inc.*, 409 F.Supp. 497 (D.C. Va., 1976) the Court declared:

<sup>2</sup>See also Concurring Opinion of Mr. Justice Stewart in *California v. La Rue*, *supra*, 409 U.S. at p. 120:

"This is not to say that the Twenty-first Amendment empowers a State to act with total irrationality or invidious discrimination in controlling the distribution and dispensation of liquor within its borders. And it most assuredly is not to say that the Twenty-first Amendment necessarily overrides in its allotted area any other relevant provision of the Constitution."

"An analysis of the progeny of *California v. La Rue* reaffirms that the Twenty-first Amendment does not supersede all other provisions of the United States Constitution in the area of liquor regulations." 409 F.Supp. at 506.

Finally, in *White v. Fleming*, *supra*, 522 F.2d at page 734, the court explained *La Rue* as follows:

"The subject of the ordinance here in question is, once again, liquor dispensing establishments. However, as the Supreme Court recognized in *La Rue*, 409 U.S. at 115, 93 S.Ct. at 395, this is only one circumstance entitled to weight: '... the case for upholding state regulation in the area covered by the Twenty-first Amendment is undoubtedly strengthened' by the amendment, *id.*, but other constitutional provisions are rendered inapplicable."

*Joseph E. Seagram and Sons v. Hostetter*, *supra*, 384 U.S. 35, is also a case in which the balancing approach of *Hostetter* was clearly approved, though after balancing interests the state liquor statute was upheld. In *Seagram & Sons*, this Court reviewed state statutes enacted following the repeal of fair-trade in New York, (Section 906, Chapter 531), which required distilled spirits suppliers to affirm to the state liquor authority that their prices to New York customers were no higher than prices at which similar liquor was sold anywhere in the United States during the same month. The Court upheld the statute based upon a finding that it placed no unconstitutional burden upon interstate commerce. *Id.*, at p.45.

Petitioner contends that *Seagram & Sons* is distinguishable from *Hostetter*, and should govern in the present case,

because it involved a state liquor law which regulated intrastate activities. This interpretation is manifestly incorrect.

First, *Hostetter* did not involve importation or interstate activities. The New York Statute at issue in *Hostetter* imposed a licensing requirement for *in-state* sales to airline passengers.

Of more importance, the decision in *Seagram & Sons* was not based upon the fact that an "intra-state" liquor statute was involved. In *Seagram & Sons*, as in *La Rue*, the *Hostetter* balancing test was noted and approved, (*Id.*, at p. 42), and the case turned upon a finding that the state regulation was *not* in conflict with the Sherman Act. The Court explained:

"Section 9 imposes no irresistible economic pressure on the appellants to violate the Sherman Act in order to comply with the requirements of § 9. On the contrary, § 9 appears firmly anchored to the assumption that the Sherman Act will deter any attempts by the appellants to preserve their New York price level by conspiring to raise the prices at which liquor is sold elsewhere in the country." *Id.*, at pp. 45-46.

The Court further noted that:

"Nothing in the Twenty-first Amendment of course, would prevent enforcement of the Sherman Act against such a conspiracy. *United States v. Frankfort Distilleries*, 324 U.S. 293, 299, 65 S.Ct. 661, 664, 89 L.Ed. 951." (Emphasis added) *Id.*, at p. 46.

The Court in *Seagram & Sons* also reserved for another day the question of "whether the mode of liquor regulation chosen by a State . . . could ever constitute so grave an

interference with a company's operations elsewhere as to make the regulations invalid under the Commerce Clause." *Id.*, at p. 42-43. This was, of course, implied recognition that state liquor laws are not immune from the mandates of the Commerce Clause.

Clearly, *Seagram & Sons* is a case, like *California v. La Rue*, which, when carefully reviewed, supports the position that the Twenty-first Amendment does not exempt all state liquor laws from the prohibitions of the Sherman Act.

The Petitioner relies primarily upon the federal district court case of *National Railroad Passenger Corp., v. Miller*, 358 F.Supp. 1321 (D.C. Kan. 1973). In *Miller*, an Amtrak passenger train traveling interstate sold liquor "by-the-drink" to its passengers during passage through Kansas, in violation of the Kansas Liquor Control Act. The Plaintiff alleged that the Kansas liquor statutes placed an unconstitutional burden upon interstate commerce in violation of Article I, Section 8, Clause 3, of the Constitution.

In upholding the Kansas statutes, the Court noted that the Twenty-first Amendment and the Webb-Kenyon Act (27 U.S.C. Section 122) provide an underlying basis for state regulation of "intoxicants brought from without the state for use and sale therein, unfettered by the Commerce Clause. *Id.*, at p. 1327. However, citing *Hostetter*, the Court also emphasized that "the Twenty-first Amendment has not operated to totally repeal the Commerce Clause in the area of the regulation of liquor traffic." *Id.* Contrary to Petitioner's contention, *Miller* clearly does not compel a ruling in the present case that the California fair-trade laws are immune from Sherman Act restraints.

It must initially be noted that *Miller* is not, by virtue of its summary affirmance by this Court in 414 U.S. 948, the latest expression of Supreme Court law on this issue. In *Craig v. Boren, supra*, a well-considered opinion of this Court approved the *Hostetter* balancing test and specifically ruled that "the Twenty-first Amendment does not pro tanto repeal the Commerce Clause, but merely requires that each provision be considered in light of the other, and in the context of the issues and interests at stake in any concrete case." *Craig v. Boren, supra*, 429 U.S. at p. 206. It should also be emphasized that the state liquor statute declared invalid in *Craig* regulated in-state activities, as do the California statutes at issue in the present case.

Further, a close reading of *Miller* reveals that the Court not only recognized *Hostetter*, (*supra*, 358 F.Supp. at p. 1327), but also, in effect, engaged in a balancing process before declaring the Kansas statute valid. At pages 1327-1328 of the decision, the Court thoroughly discusses the policies served by the state law, and the importance of those policies and interests within the state of Kansas. Only after that discussion did the Court uphold the state law. *Id.*, at p. 1328.

Finally, *Miller* does not strictly involve an in-state situation. In *Miller*, Amtrak was importing liquor into the state for use within the state in contravention of state law. Respondent submits that the court in *Miller* emphasized this importation aspect in balancing in favor of the state law. Clearly, Section 2 of the Twenty-first Amendment, by its terms, has been recognized as giving the states greater power and interest over the regulation of transportation



or importation of liquor into a state. This importation factor also distinguishes *Miller* from *Hostetter*.

Finally, an interpretation of *Miller* as somehow limiting or overturning the balancing approach of *Hostetter* is inconsistent with another federal court case summarily affirmed by this Court. In *Epstein v. Lordi*, 261 F.Supp. 921 (D.C. N.J. 1966); aff'd 389 U.S. 29, 88 S.Ct. 106, 19 L.Ed.2d 29 (1967) the plaintiff sought to enjoin enforcement of a New Jersey statute which required a state-issued license for the conduct of wholesale liquor operations in New Jersey.<sup>3</sup> The Plaintiff contended that the statute was repugnant to the Commerce, Export-Import and Supremacy Clauses of the United States Constitution.

In *Epstein*, the court declared that a state liquor law is invalid under the following circumstances:

"On the other hand, State regulation of liquor under the police power, as in other fields of commerce, is invalid if: (a) the subject demands national uniformity so that the State action is precluded even absent Federal action; (b) Congress has occupied the field to the exclusion of State regulation; or (c) a particular State statute conflicts directly with an express regulation by Congress. *Cooley v. Board of Wardens*, 12 How. 299, 13 L.Ed. 996 (1951); *Kelly v. State of Washington*, 302 U.S. 1, 58 S.Ct. 87, 82 L.Ed. 3 (1937)." *Id.*, at p. 931.

In dealing with conflict between the Commerce Clause and the state liquor regulation, the court interpreted *Hostetter* as follows:

<sup>3</sup>The plaintiff wholesaler was engaged in the sale of liquor to vessels docked in New Jersey.

"On the contrary, we read *Hostetter* as requiring a case by case consideration of the national interests protected by the Commerce Clause, not merely to measure the extent of State power under the Twenty-first Amendment, but rather to determine whether the Amendment applies at all to the liquor in question; in a word, whether the liquor enters New Jersey 'for delivery or use therein.'"

After considering and balancing the interests promoted by the conflicting laws, the court declared the state regulation invalid. Concededly, *Epstein* involved the sale of liquor within the state for consumption elsewhere, which favored federal rather than state interests upon balancing. However, the need to resort to the balancing test articulated in *Hostetter* and *Rice* was made clear in *Epstein*. There is no merit to Petitioner's contention that the California fair trade scheme is saved by the Twenty-first Amendment. The balancing test employed by *Rice* to resolve the conflict between a state liquor regulation and federal antitrust laws is clearly supported by the decisions of this Court.

In *Rice* the California Supreme Court considered the interests and policies of the California distilled spirits minimum price fixing scheme and the Sherman Act, and concluded that the balancing process favored the federal antitrust regulations. (See *Rice, supra*, 21 Cal.3d at p. 451-459.) In the case now before the Court, the same balancing process should obviously yield the same result.

In undertaking this balancing process, the Court is not merely seeking to discover if the state's police power under the Twenty-first Amendment has been properly exercised. Such a review would simply inquire into a rational and

reasonable basis for the state enactment. Rather, the considerations for the conflicting laws must be balanced as *Hostetter* directs.

The policies underlying the Sherman Act have been clearly stated in the case law. The aim of antitrust legislation is to protect, preserve, and prevent restraints upon free competition. See *Gordon v. New York Stock Exchange, Inc.* 422 U.S. 659, 689, 95 S.Ct. 2598, 45 L.Ed.2d 463 (1975); *E. J. Delaney Corp. v. Bonne Bell, Inc.* 525 F.2d 296, 302 (10th Cir., 1975); *Adams v. American Bar Assn.* 400 F. Supp. 219 (D.C. N.J. 1975).<sup>4</sup> In the vindication of these policies, any combination to fix prices or tamper with the price structure is unlawful. *Schwegmann Bros. v. Calvert Distillers Corp.* 341 U.S. 384, 386, 71 S.Ct. 745, 95 L.Ed. 1035 (1951).

The fair trade scheme in California, pursuant to the statutes here in question, has the effect of allowing, and even encouraging, vertical and horizontal restraints on competition. In a California Senate Committee Report cited in *Rice*, it was noted that the fair trade system in California "has resulted in the elimination of any semblance of competition within the industry." California Senate Select Committee Report on Laws Relating to Alcoholic Beverages Vol. I, at p. 9 (1974). The Committee also declared that because of the fair trade scheme "the consumer pays about the highest retail prices for liquor, beer and wine in the country, although the state levies one of the lowest excise taxes on these beverages." *Id.*, at pp. 82-83. The *Rice*

<sup>4</sup>In this regard see also the Sherman Act policy description of Justice Black in *Northern P. R. Co. v. United States* 356 U.S. 1, 4-5, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958).

court also noted a uniformity in price and the absence of free and unfettered competition within the industry. *Rice, supra*, at p. 456. Without question, the California fair trade laws violate the policies embodied in the Sherman Act.

On the other side of the balance, the policies of the Twenty-first Amendment and the California price maintenance provisions must be considered. As previously noted, the primary purpose of the Twenty-first Amendment is to allow a state to protect itself from the "transportation or importation of liquor into the state . . . for delivery or use therein." (Emphasis added.) See *United States v. State Tax Commission of Mississippi* 412 U.S. 363, 376, 93 S.Ct. 2183, 37 L.Ed.2d 1 (1973); *Lamp Liquors, Inc. v. Adolph Coors Co., supra*, 563 F.2d at p. 431. See also *Hostetter v. Idlewild Liquor Corp., supra*, 384 U.S. at p. 330.

Sections 24862 and 24866 of the California Business and Professions Code, which require bottled wines to be sold to licensed California retailers at prices contained in fair trade contracts or filed price schedules, and to be sold to California consumers at not less than prices contained in such fair trade contracts or filed price schedules, do not regulate "transportation or importation" of liquor into California. Therefore, the statutes do not really fall within the literal language of, or primary policies served by the Twenty-first Amendment. *Sail'er Inn, Inc. v. Kirby, supra*, 5 Cal.3d at pp. 12-13.

The price maintenance provisions are purportedly designed to promote orderly marketing conditions and prevent predatory pricing, thereby encouraging temperance and protecting small retailers. *Rice, supra*, 21 Cal.3d at p.

456. However, in rejecting the argument that fair trade laws are necessary to the economic survival of small retailers, *Rice* cited a Report of the Senate Judiciary Committee, which relied upon studies to conclude that the absence of fair trade had not injured small retailers.<sup>5</sup> (See U.S. Code Cong. & Admin. News at pp. 1569-1572 (1975).)

Further, fair trade laws have had little effect upon temperance. A report of the Moreland Commission in New York, cited in *Seagram & Sons v. Hostetter*, *supra*, 384 U.S. 35, at p. 39, and *Rice*, declares that "compulsory resale price maintenance had had no significant effect upon consumption of alcoholic beverages, upon temperance or upon the incidence of social problems related to alcohol." See *Rice*, *supra*, 21 Cal.3d at p. 457. A 1974 California study found that per capita consumption of distilled spirits in California had increased by 42% between 1950 and 1972, and concluded that "There is little compelling evidence to suggest that . . . fair trade . . . promote(s) temperance . . ." (Alcohol and the State: A Reappraisal of California's Alcohol Control Policies, at p. xi, 15, (1974).)<sup>6</sup>

Recent developments also reveal that fair trade laws are now contrary to public policy. California has recently repealed non-liquor fair trade laws, (See Stats. Ch. 402,

<sup>5</sup>This report recommended repeal of the Miller-Tydings Act and the McGuire Act, and concluded that: "no evidence was presented to indicate that there were destructive predatory practices in states which have repealed Fair Trade Laws." U.S. Code Cong. & Admin. News, op. cit., at p. 1571 (1975).

<sup>6</sup>As *Rice* points out, other authorities have reached similar conclusions. (See e.g., Sen. Select Com. Rep. on Laws Relating to Alcoholic Beverages, vol. 3, at p. 69 (1974); Dunsford, State Monopoly and Price-Fixing in Retail Liquor Distribution, Wis. L. Rev. 454, 483 (1962).

at p. 878, (1975)), as have many other states. Hawaii repealed its liquor fair trade law just this year. (Ch. 708, Section 880, 1979 Laws of Hawaii, effective June 6, 1979).

Finally, as *Rice* noted, other provisions of California law promote the goals of the price maintenance statutes without conflicting with the Sherman Act. See *Rice*, *supra*, 21 Cal.3d at p. 458.

The Sherman Act seeks to promote important economic policies, and thereby protect all consumers. As previously discussed, these underlying policies are clearly violated and undermined by the California liquor price maintenance laws. When considered in light of the doubtful value of these price maintenance laws in promoting temperance, the clear national trend away from fair trade laws, the alternate means available to achieve the ends which such laws seek to attain, and the purpose of the Twenty-first Amendment, it must be concluded, as in *Rice*, that on balance the Sherman Act must prevail and Petitioner's Petition for Writ of Certiorari must be denied.

## II

### **California Business And Professions Code Sections 24862 And 24866, Which Require the Posting of Resale Prices For Wines, Violate the Sherman Antitrust Act and Are Not Insulated Therefrom By the State Action Exemption**

California Business and Professions Code Sections 24862 and 24866, and regulations promulgated thereunder, contain the price posting and resale price maintenance provisions for wine in California. In essence, those sections require the wine grower to post the prices at which Cali-



fornia wholesalers must sell to California retailers, and the minimum prices at or above which the retailer must sell to the consumer for consumption off the premises. These prices are posted monthly with the Department of Alcoholic Beverage Control on prescribed forms. If no new price is posted, the last price posted remains in effect. All applicable prices are set solely at the discretion of the wine grower. No guidelines or constraints are provided, and the state exercises no control over the prices that are posted.

In its original form the Sherman Antitrust Act (15 U.S.C. Section 1) stated:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal."

Thereafter, Congress adopted two significant amendments relevant to the instant controversy. The first was the Miller-Tydings Act (50 Stat. 693) which permitted fair trade contracts prescribing minimum resale prices for certain goods. The second was the McGuire Act (66 Stat. 632), which permitted non-signer provisions, allowing the fixing of minimum resale prices at which commodities could be resold, even though a particular retailer had not entered into a fair trade contract for the commodity, provided the retailer had knowledge of an existing fair trade contract for the particular commodity.

*Schwegmann Bros. v. Calvert Corp.* 341 U.S. 384, 71 S.Ct. 745, 95 L.Ed. 1035 (1951) clearly states that absent amendments such as the Miller-Tydings Act and McGuire Act, resale price maintenance provisions such as those at issue here are illegal.

"It is clear from our decisions under the Sherman Act, 26 Stat. 209, 15 U.S.C.A. Sections 1-7, 15 note, that this interstate marketing arrangement would be illegal, that it would be enjoined, that it would draw civil and criminal penalties, and that no court would enforce it. Fixing minimum prices, like other types of price fixing, is illegal *per se*. Resale price maintenance was indeed struck down in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 31 S.Ct. 376, 55 L.Ed. 502. The fact that a state authorizes the price fixing does not, of course, give immunity to the scheme, absent approval by Congress." 341 U.S. at p. 386, 71 S.Ct. at p. 746.

It should be noted that the McGuire Act was enacted in response to *Schwegmann*. However, in 1975, Congress repealed both the McGuire Act and the Miller-Tydings Act, thus leaving the Sherman Act essentially in its original form. Thus, the state of the law is much the same as it was at the time of the *Schwegmann* decision, but fair trade contracts are now disfavored as well. Thus, according to the *Schwegmann* rationale, price fixing and resale price maintenance as contemplated by the statutes at issue here are invalid.

Though the statutory language presently provides no exception to the Sherman Antitrust Act, case law has developed two doctrines which exempt conduct that would otherwise contravene that Act. One, the right to petition exemption (also known as the *Noerr-Pennington* doctrine, from the decisions in the cases of *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14

L.Ed.2d 626 (1965)) permits an individual to seek legislation or invoke regulatory procedures that may otherwise constitute a restraint of trade, pursuant to the protections guaranteed by the First Amendment freedom of petition. The second, and the exemption of significance in the instant controversy, is the so-called state action exemption.

The state action exemption was first announced in *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). In *Parker*, this Court reviewed a state statute which created a marketing program for raisins which was intended to govern the quality of exported raisins and to maintain price stability. Under the program, a given number of producers in a particular area could seek the establishment of the marketing plan by petitioning the state Agricultural Prorate Commission, a nine-member body whose members included the Director of the Department of Agriculture and eight other members appointed by the Governor and confirmed by the Senate. The Commission reviewed the producers' petition, and was permitted, but not required, to approve it. The review process included a public hearing, economic findings and a showing that a prorate program would meet the goals of the Act without permitting unreasonable profits to the raisin producers. Upon the granting of the petition, the Director, with the approval of the Commission, selected a program committee from among the producers of the area. The program committee formulated the program itself. Public hearings were held on that proposal, and the Commission was authorized to approve, modify or reject the program. Upon approval by the Commission, the program was submitted to the raisin producers for final approval.

The Court, in setting forth the state action exemption, held that the Sherman Act

"must be taken to be a prohibition of individual and not state action. It is the state which has created the machinery for establishing the prorate program. Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the Commission, must also be approved by referendum of producers, it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy. The prerequisite approval of the program upon referendum by a prescribed number of producers is not the imposition by them of their will upon the minority by force of agreement or combination which the Sherman Act prohibits. The state itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application. The required vote on the referendum is one of these conditions. Compare *Curran v. Wallace*, 306 U.S. 1, 16, 59 S.Ct. 379, 387, 83 L.Ed. 441; *Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 407, 48 S.Ct. 348, 351, 72 L.Ed. 624; *Wickard v. Filburn*, 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122."

*Parker v. Brown*, *supra*, 317 U.S. at 352, 63 S.Ct. at 314.

In contrast to the instant case, the Agricultural Prorate Act required public hearings at two different stages of the adoption of the program. The state was involved at each stage through a commission whose members were appointed by the Governor and confirmed by the Senate, allowing the state to actively participate in all aspects of the creation of the program. Additionally, in establishing prices, the

state was required to find that the program was not only necessary but that the result would not be excessive profits for the raisin producers. The price maintenance provisions of the Alcoholic Beverage Control Act contain no such state action. Prices are subject to whim and caprice of the wine growers. The state merely records the posted prices without review as they are received. Clearly the uncontrolled establishment of prices by wine growers, without review by the State, and subject to no real state control, cannot be considered to fall within the realm of the *Parker* holding.

In the intervening period since the *Parker* holding, this Court has been called upon to review that decision and to consider other factual situations in which one of the parties attempted to extend the state action exemption. However, while those decisions have clarified the scope of the exemption, the *Parker* decision remains essentially unchanged.

In *Goldfarb v. State Bar of Virginia*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975), the Court held that a minimum fee schedule for lawyers published by a county bar association and enforced by the State Bar Association violated the Sherman Act because the conduct in question was not required by either the State Supreme Court or the State Bar Association, but rather by the county bar association, which was not a state agency. Further, no statutory provisions required the activities, and it was not enough that the fee schedules were "prompted" by mention of advisory fee schedules in the state ethical codes. 95 S.Ct. at 2014. The Court further noted that while the state has a compelling interest in regulating the practice of law within

the state, that, by itself, gives the state no authority to contravene the Sherman Act in such a manner.

In *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976), the Court again examined the application of the *Parker* holding in the setting of a public utility which includes as part of its tariff, a program for providing free light bulbs to its electric customers. The Court held the program invalid, finding no state action. In so holding, the Court thoroughly reviewed the *Parker* decision, explaining the importance of state involvement in such programs. The Court found such state involvement lacking in the light bulb program, and further noted that there was no overriding statewide policy which was effectuated by the program.

In *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691 (1977), the Court was asked to rule on the validity of a state disciplinary rule and a rule of the State Supreme Court, both of which prohibited advertising by members of the bar. In upholding those provisions against claims of antitrust violations, this Court stated:

"The Arizona Supreme Court is the real party in interest; it adopted the rules, and it is the ultimate trier of fact and law in the enforcement process. Although the State Bar plays a part in the enforcement of the rules, its role is completely defined by the court; the appellee acts as the agent of the court under its continuous supervision. . . . Moreover, as the instant case shows, the rules are subject to pointed re-examination by the policy maker, the Arizona Supreme Court, in enforcement proceedings. Our concern that federal policy is being unnecessarily and inappropriately subordinated to state policy is reduced in such a situation;



we deem it significant that the state policy is so clearly and affirmatively expressed and that the State's supervision is so active." (citations omitted) 97 S.Ct. at 2697-2698.

Contrary to the assertions of Petitioner (see Brief at p. 22), the analysis of the state action exemption in *Rice* has not "created an intolerable situation of uncertainty and confusion in this area."

The four above-cited cases clearly show the impropriety of applying the state action exemption to the instant matter. The state plays no role whatever in setting the resale prices, whether the absolute wholesaler-to-retailer price or minimum retailer-to-consumer price. The prices are established purely at the unbounded discretion of the wine grower according to its own economic interest. The state does nothing more than enforce the price posting provisions; there is no control, or "pointed re-examination," as in *Bates*, to ensure that the practical effects of the price posting program are consistent with the Sherman Act. (Compare *Rice*, 21 Cal.3d at p. 445)

Finally, Petitioner totally misreads *Parker*. Petitioner states that *Parker* is applicable here because in both the Agricultural Prorate Program and in the Alcoholic Beverage Control Act, a comprehensive plan for marketing and/or sale, including price setting, had been adopted and was enforced by the state. However, that broad generalization fails to disclose the intensive state participation in *Parker*, and the lack of the same in the instant case.

In *Parker*, the prorate programs were established on an area-by-area basis. Upon petition, a *state commission* held

hearings and reviewed the petition; if satisfactory, the *state commission* established a local committee to formulate a program. The program was then submitted to the *state commission* for its approval. Hearings were again held; the commission was free to accept, reject or modify the program. No such control is present with regard to the alcoholic beverage industry in California.

The emphasis of the *Parker* court on the importance of close control and supervision by the state is underscored by the *Cantor* opinion. In *Cantor*, the Court noted that Chief Justice Stone made 13 references in a three-page discussion to the fact that state action was involved. Further, "[e]ach time his language was carefully chosen to apply only to official action, as opposed to private action approved, supported, or even directed by the State." (*Cantor, supra*, 428 U.S. at p. 591, fn. 24) Thus, not only do California's price maintenance provisions violate the Sherman Act because there is no state action involved in the price posting scheme, but, as *Parker* indicates, the provisions are invalid because the conduct is carried out by private citizens, rather than public officials. (See *Parker*, 317 U.S. at p. 350) As the *Cantor* court noted at the conclusion of the above-cited footnote, "[t]he cumulative effect of these carefully drafted references unequivocally differentiates between official action, on the one hand, and individual action (even when commanded by the State) on the other hand."

The question before the Court is whether the state action exemption, in order to protect a price fixing law from the prohibitions of the Sherman Act, must be the act of the state itself or over which the state has the ultimate control,

or whether it is sufficient that the statute in question compels private persons to engage in anti-competitive conduct, but provides for no state control over those actions. *Parker* was emphatic in its holding that the act must be that of the state itself. Thus, California Business and Professions Code Sections 24862 and 24866 must be declared invalid, and Petitioner's Petition for Writ of Certiorari must be denied.

### III

#### **Petitioner Has Failed to Present Sufficient Grounds to Justify the Granting of Writ of Certiorari**

##### **A. The Rice Decision Has Created No Uncertainty or Confusion in California**

Petitioner urges this Court to review the judgment and opinion of the Court of Appeal in the instant matter because "[t]he effect of the *Rice* case and the instant Mideal case has been to put the alcoholic beverage regulation in California into a state of great confusion and uncertainty . . ." (Brief of Petitioner, at p. 32).

In *Rice*, the California Supreme Court ruled invalid a California statute requiring the posting of minimum retailer-to-consumer prices by the brand owner of distilled spirits. There can be no doubt that that decision has spawned litigation, both through the administrative process (i.e., the Alcoholic Beverage Control Appeals Board) and through the courts. What Petitioner fails to recognize, however, is that the "confusion" is primarily due to a peculiar provision in the California Constitution which prevents the Director of the Department of Alcoholic Beverage Control from extending the holding of *Rice* to clearly analo-

gous statutory provisions. Thus, while the Director could have declared the sections at issue here invalid prior to the adoption on June 6, 1978, of Art. III, Section 3.5, a judicial determination is now required. Indeed, prior to the time the original pleadings were filed in the State Court of Appeal, the Director of the Department wrote two letters in which he stated that the Department would continue to enforce wine price posting provisions. (See Appendices A and B) In the second letter, addressed to Mr. John A. DeLuca, President of the Wine Institute, the Director states:

"After a careful reading of the case to which you refer and considering the strictures imposed by the recently enacted Proposition 5 [now Art. III, Section 3.5, California Constitution], the Department believes it has no choice but to continue to administer and enforce the sections of law not specifically ruled upon by the California Supreme Court."

The Alcoholic Beverage Control Appeals Board apparently feels similarly constrained. Thus, when faced with the issue of extending the *Rice* holding regarding distilled spirits to wines, the Board declined to do so citing Art. III, Section 3.5. (See *Capiscean Corporation v. Alcoholic Beverage Control Appeals Board*, 87 Cal.App.3d 996, 998, 151 Cal.Rptr. 492 (1979).)

More recently, the Board was asked to invalidate minimum consumer resale prices for beer (see In the Matter of Accusation Against Ferrigno, Appendix E to Petitioner's Brief). Though the Board noted that the provisions at issue in that case were probably invalid based upon *Rice* and *Capiscean*, the Board "is prohibited from declar-

ing said provisions invalid by reason of Art. III, Section 3.5 of the California Constitution." (Petitioner's Brief at E-8)

Further, the number of statutes within the Alcoholic Beverage Control Act subject to attack in California is limited, and it is inconceivable that the litigation with which Petitioner is concerned will persist. Additionally, while the *Rice* decision may have given the litigants encouragement to challenge statutory provisions, that decision certainly cannot be the sole reason for the attacks. Indeed, the section at issue in *Rice* had been attacked on numerous occasions in the past. (See, e.g., *Allied Properties v. Dept. of Alcoholic Beverage Control*, 53 Cal.2d 141, 346 P.2d 737 (1959); *Wilke & Holzheiser, Inc. v. Dept. of Alcoholic Beverage Control*, 65 Cal.2d 349, 55 Cal. Rptr. 23, 420 P.2d 735 (1966); and *Samson Market Co. v. Alcoholic Beverage Control Appeals Board*, 71 Cal.2d 1215, 81 Cal.Rptr. 251, 459 P.2d 667 (1969).) Thus, the *Rice* decision is merely a portion of a problem peculiar to the State of California, and is not of significant concern to warrant the granting of the Petition for Writ of Certiorari as prayed for by Petitioner.

It is also significant to note that in neither *Rice* nor the instant matter did the Director of the Department of Alcoholic Beverage Control seek review by this Court. Thus, while Petitioner expresses concern regarding the multiplicity of suits following *Rice*, the party most directly affected is notably disinterested.

## B. Other States

Petitioner's fears regarding the effect of *Rice* on pricing statutes in other states, is, at this point in time, premature. Of the fourteen states which Petitioner cites as having resale price maintenance statutes, Hawaii has already repealed its statute (Ch. 708, Section 880, 1979, Laws of Hawaii, effective June 6, 1979). Among the other thirteen states, only New York has seen its pricing scheme challenged. Further, the only reported decision in that state came from the Appellate Division of the Supreme Court, one step removed from the state's highest tribunal, the Court of Appeals. Until the matter has been fully reviewed by the New York Court of Appeals, it is premature to allege conflict or confusion.

Petitioner also seems concerned about a statement by Justice Suozzi, concurring in *In the Matter of William J. Mezzetti Associates, Inc. v. State Liquor Authority*, 410 N.Y.S.2d 893 (1978), in which he stated that his concurrence was based solely upon prior decisions, but that he felt that the *Rice* decision was correct and that New York's price maintenance statute violates the Sherman Act. Petitioner's chief concern seems to be that states across the land will follow *Rice*. Petitioner even suggests that because *Rice* is a California decision, it carries more weight. Such a characterization is unfair to the courts of other states, and fails to recognize the obvious—that the *Rice* case was correctly decided.

Because *Rice* was correctly decided, and because there are no conflicting decisions from other states, there is no need for this Court to grant the Writ of Certiorari as prayed for by Petitioner.



**CONCLUSION**

For each of the foregoing reasons, Petitioner's Petition for Writ of Certiorari should be denied.

Dated: August 15, 1979

Respectfully submitted,

FRANK C. DAMRELL

DAMRELL, DAMRELL & NELSON

*Attorneys for Respondent*

*Midcal Aluminum, Inc.*

**(Appendices Follow)**

**Appendices**

**APPENDIX "A"**

**(Letterhead of Department of Alcoholic Beverage  
Control, 1215 "O" Street, Sacramento 95814)**

July 6, 1978

TO: ALL PRICE POSTING LICENSEES

As you are aware, the May 30, 1978, decision of the California Supreme Court in the matter of Rice v. Alcoholic Beverage Control Appeals Board struck down the consumer price maintenance provisions of Section 24755 of the Alcoholic Beverage Control Act.

Some confusion has arisen among price posting licensees as to the impact of that decision on related sections and regulations within the Act dealing with price filings at other levels.

The decision of the court, which is now in effect, dealt only with the *consumer* price filings for distilled spirits and beer. Accordingly, brand owners or authorized licensees who were previously filing forms ABC-705 (distilled spirits) and ABC-704 (beer) need no longer, and should not, continue to file those forms with the Department.

The question before the court and the resulting decision did not directly address or affect Sections 24862 (wine), 25000 (beer), and 24756 (distilled spirits) which require supplier level licensees to file price schedules showing the prices at which alcoholic beverages are sold to *retailers*.

Therefore, licensees who were previously filing price and discount schedules for prices at the wholesaler to retailer

level, including brewery to wholesaler in the case of beer, must continue to comply with the applicable sections of law and adhere to such prices and discounts on all sales.

Any question as to the constitutionality of the sections cited above must be resolved by legislative action or by a court decision. In the meantime, the Department has no choice but to continue to administer and enforce those sections of law.

/s/ Baxter Rice  
Baxter Rice  
Director

Distribution C-3

**APPENDIX "B"**

**(Letterhead of Department of Alcoholic Beverage  
Control, 1215 "O" Street, Sacramento 95814)**

(916) 445-3221

July 11, 1978

Mr. John A. De Luca  
President  
Wine Institute  
165 Post Street  
San Francisco, CA 94108

Dear Mr. De Luca:

In your letter of July 7, 1978, the following question is posed:

"Until legislative or court action further clarifies and defines the scope of the California Supreme Court's decision in the case of Rice v. Alcoholic Beverage Control Appeals Board, will the California Department of Alcoholic Beverage Control continue to administer and enforce those provisions of Sections 24862 and 24866 of the Alcoholic Beverage Control Act which require wine suppliers to post minimum *consumer* prices?"

After a careful reading of the case to which you refer and considering the strictures imposed by the recently enacted Proposition 5, the Department believes it has no choice but to continue to administer and enforce the sections of law not specifically ruled upon by the California Supreme Court.



B-2

Among the sections the Department will continue to enforce are those you mention, i.e., Sections 24862 and 24866 of the Alcoholic Beverage Control Act.

If we may be of further assistance, please call on us.

Sincerely,

/s/ Baxter Rice  
Baxter Rice  
Director

NOV 15 1979

MICHAEL RODAK, JR., CLERK

# In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-97

CALIFORNIA RETAIL LIQUOR DEALERS ASSOCIATION,  
a California corporation,  
*Petitioner*

vs.

MIDCAL ALUMINUM, INC., a California corporation,  
*Respondent*

BAXTER RICE as Director of the Department of Alcoholic  
Beverage Control of the State of California,  
*Respondent*

## PETITIONER'S OPENING BRIEF

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## **SUBJECT INDEX**

	<u>Page</u>
Jurisdiction .....	1
Opinions below .....	2
Statutory provisions involved .....	2
Questions presented .....	2
Statement of the case .....	3
Summary of the argument .....	11
California's legislative scheme for setting prices for alcoholic beverages within its borders is valid under the Twenty-First Amendment and does not violate the Sherman Act .....	18
California's legislative scheme for setting prices for alcoholic beverages within its borders is valid under the "state action" exemption to the Sherman Act .....	43
Conclusion .....	47



## TABLE OF AUTHORITIES CITED

## Cases

	<u>Page</u>
Federal:	
Bates v. State Bar of Arizona, 433 U.S. 350 .....	17
California v. La Rue, 409 U.S. 109 (1972) .....	11, 14, 28, 41
Cantor v. Detroit Edison Co., 428 U.S. 579 .....	17, 46
Castlewood Intern. Corp. v. Simon, 596 F.2d 638 (5th Cir., 1979) .....	13, 41, 42
Clark Distilling Co. v. Wes'n Md. Ry. Co., 242 U.S. 311 (1917) .....	11, 12, 13, 31, 32, 33, 34, 35
Collins v. Yosemite Park & Curry Co., 304 U.S. 518 (1938) ..	40, 42
Craig v. Boren, 429 U.S. 190 (1976) .....	12, 13, 15, 20, 26, 30, 31, 37, 38, 40, 42
Department of Rev. v. James B. Beam Distill. Co., 377 U.S. 341 (1964) .....	15, 36, 40, 42
Dr. Miles Medical Co. v. Park & Son Co., 220 U.S. 373 (1910) ..	22
Ferguson v. Skrupa, 372 U.S. 726 .....	17, 18, 19
Hostetter v. Idlewild Liquor Corp., 377 U.S. 324 (1964) .....	14, 15, 30, 31, 38, 39, 40, 42
Jamison & Co. v. Morgenthau, 307 U.S. 171 .....	39
Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 .....	17
Leisy v. Hardin, 135 U.S. 100 .....	11
McCormick & Co. v. Brown, 286 U.S. 131 (1932) ..	12, 13, 35, 36
National Railroad Passenger Corp. v. Miller, 358 F.Supp. 1321 (D.C. Kan., 1973), affirmed 414 U.S. 948 ..	12, 13, 14, 28, 29, 36
Nebbia v. People of the State of New York, 291 U.S. 502 (1934) .....	18
New Motor Vehicles Bd. of Cal. v. Orrin W. Fox Co., 439 U.S. 96 (1978) .....	16, 17, 44, 46
Old Dearborn Co. v. Seagram Corp., 299 U.S. 183 (1936) ..	22
Parker v. Brown, 317 U.S. 341 (1942) .....	17, 45, 46
Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951) .....	17, 22, 23, 24, 46
Seagram & Sons v. Hostetter, 384 U.S. 35 (1966) .....	13, 14, 20, 26, 27
State Board v. Young's Market Co., 299 U.S. 59 (1936) .....	26
U.S. v. Frankfort Distilleries, 324 U.S. 293 .....	14, 19, 20, 21, 25
Wisconsin v. Constantineau, 400 U.S. 433 (1970) .....	15, 42
Ziffrin, Inc. v. Reeves, 308 U.S. 132 .....	13

## TABLE OF AUTHORITIES CITED

## CASES

	<u>Page</u>
State:	
Allied Properties v. Department of Alcoholic Beverage Control (1959) 53 Cal.2d 141, 346 P.2d 737 .....	8, 44
Big Boy Liquors, Ltd. v. Alcoholic Bev. etc. Appeals Bd. (1969) 71 Cal.2d 1226, 459 P.2d 674 .....	8
Midcal Aluminum, Inc. v. Rice (1979), 90 Cal.App.3d 979 ..	10, 20
Rice v. Alcoholic Bev. etc. Appeals Board (1978) 21 Cal.3d 431 .....	5, 8, 10, 14, 16, 17, 19, 20, 21, 25, 26, 29, 37, 38, 42, 43, 44
Samson Market Co. v. Alcoholic Bev. etc. Appeals Bd. (1969) 71 Cal.2d 1215, 459 P.2d 667 .....	8
Schwartz v. Kelly (1953) 99 A.2d 89, 140 Conn. 202 .....	24
Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control (1966) 65 Cal.2d 349, 420 P.2d 735 .....	8

## Constitutions

California Constitution:	
Article XX, Section 22 .....	2, 3, 4, 5
United States Constitution:	
Tenth Amendment .....	11, 16, 20
Fourteenth Amendment .....	17
Eighteenth Amendment .....	12, 32, 35, 36
Twenty-first Amendment .....	passim
Article I, Section 8, Cl. 3 .....	2

## Rules

Title 4, California Administrative Code:	
Rules 1-145 .....	5
Rule 101 .....	5, 7
Rule 101(a)(b) .....	2

## Statutes

Alcoholic Beverage Control Act (California Business & Professions Code):	
Sections 23000-25763 .....	4
Section 23816 .....	6
Section 23817 .....	6
Section 24749 .....	44, 45
Section 24755 .....	2, 5, 8, 9

TABLE OF AUTHORITIES CITED  
STATUTES

	<u>Page</u>
Section 24756 .....	6
Section 24862 .....	2, 3, 5, 7
Section 24864 .....	6
Section 24866 .....	2, 3, 5
Section 24871 .....	6
Section 24871.5 .....	6
Section 24878 .....	6
Section 25000 .....	6
Section 25000.5 .....	6
Sections 25500-25510 .....	6
Section 25509 .....	6
Section 25611.1 .....	6
Section 25612 .....	6
Sections 25631-25633 .....	6
Section 25750 .....	5
Federal Alcoholic Administration Act (27 U.S.C. § 201 et seq.)	42
McGuire Act (66 Stat. 632) .....	21, 22, 23
Miller-Tydings Act (50 Stat. 693) .....	17, 21, 22, 23, 46
National Prohibition Act .....	36
Rail Passenger Service Act (45 U.S.C. Section 501 et seq.)	14, 28
Sherman Antitrust Act .....	passim
15 U.S.C. Section 1 .....	2, 8
15 U.S.C. Section 2 .....	2
Webb-Kenyon Act .....	passim
27 U.S.C. Section 122 .....	2, 31, 36
Wilson Act .....	passim
27 U.S.C. Section 121 .....	30
28 U.S.C. Section 1257(3) .....	1

**Other Authorities**

Deering's California Codes Annotated, Constitution Article XX, § 22 .....	5
S.R. Rep. No. 466, 94th Cong., 1st Sess., p. 2 (1975); Reprinted in 1975 U.S. Code, Cong. & Admin. News, at pp. 1569, 1571	22

# In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

**No. 79-97**

CALIFORNIA RETAIL LIQUOR DEALERS ASSOCIATION,  
a California corporation,  
*Petitioner*

vs.

MIDCAL ALUMINUM, INC., a California corporation,  
*Respondent*

BAXTER RICE as Director of the Department of Alcoholic  
Beverage Control of the State of California,  
*Respondent*

## PETITIONER'S OPENING BRIEF

### JURISDICTION

The opinion of the Court of Appeal of California, Third Appellate District, was entered on March 26, 1979. The Court of Appeal denied a timely Petition for Rehearing on April 19, 1979. On May 24, 1979, the Supreme Court of California denied a timely Petition for Hearing.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257(3).

### OPINIONS BELOW

The opinion of the Court of Appeal, entered March 26, 1979, is reported at 90 Cal.App.3d 979 (1979) (Appendix A, Pet. for Cert.) The Court of Appeal's denial of Petition for Rehearing was entered on April 19, 1979. The California Supreme Court's denial of Petition for Hearing was entered on May 24, 1979 (Appendix B, Pet. for Cert.)

### STATUTORY PROVISIONS INVOLVED

The following constitutional provisions, statutes and rules are involved in this proceeding and are set forth in the Appendix to this brief as indicated:

	<u>Page</u>
<b>Constitutions:</b>	
United States Constitution:	
Article I, § 8, cl. 3 (Commerce Clause) .....	A-1
Twenty-first Amendment, Sections 1 and 2 .....	A-1
California Constitution:	
Article XX, Section 22 .....	A-1
<b>Rules:</b>	
Title 4, California Administrative Code	
Rule 101 (a) (b) .....	A-7
<b>Statutes:</b>	
Sherman Antitrust Act (15 U.S.C. §§ 1, 2) .....	A-9
Webb-Kenyon Act (27 U.S.C. § 122) .....	A-10
Alcoholic Beverage Control Act	
(California Business & Professions Code):	
Section 24862 .....	A-10
Section 24866 .....	A-11
Section 24755 (this section is set forth in part insofar as it is relevant in this proceeding in footnote 1, appendix C-2 and 3 of the Petition for Writ of Certiorari filed herein and is not repeated here) .....	A-12

### QUESTIONS PRESENTED

The California Supreme Court in 1978 held that § 24755 of the California Alcoholic Beverage Control Act was invalid under the Sherman Antitrust Act. The California

Court of Appeal in this case, stating it was "bound" by that California Supreme Court ruling held that §§ 24862 and 24866 of the same Act were likewise invalid under the Sherman Act. The statutes involved require producers to set minimum wholesale and retail prices for their alcoholic beverages, post those prices with the State, require sales at no less than the posted prices and require enforcement of the provisions by the state agency charged by law with that duty under the regulatory act. The statutes are part of a broad, comprehensive act regulating the use, sale, possession and distribution of alcoholic beverages within the State of California. The questions presented are:

1. Does the Twenty-first Amendment confer upon a State the power to enact such regulatory statutes notwithstanding the Sherman Antitrust Act?
2. Does the "state action" exemption apply to the statutes and thereby place them outside the reach of the Sherman Antitrust Act?

### STATEMENT OF THE CASE

California, like other States, has a comprehensive regulatory scheme which regulates all aspects of the alcoholic beverage industry in California from manufacturer through the retailer. The California Constitution, in Article XX, § 22, provides that:

"The State of California, subject to the Internal Revenue laws of the United States, shall have the exclusive right and power to license and regulate the manufacture, sale, purchase, possession and transportation of alcoholic beverages within the State, and subject to the laws of the United States regulating



commerce between foreign nations and among the States shall have the exclusive right and power to regulate the importation into and the exportation from the State, of alcoholic beverages. In the exercise of these rights and powers, the Legislature shall not constitute the State or any agency thereof a manufacturer or seller of alcoholic beverages. . . ."<sup>1</sup>

The California Constitutional provision became effective on December 5, 1933, the same date as the ratification of the Twenty-first Amendment to the United States Constitution.

The California Legislature, shortly after the adoption of the California Constitutional provisions referred to, enacted an extensive and comprehensive statutory scheme for regulating alcoholic beverages within the State, and over the years since<sup>2</sup> has amended and repealed statutes and added new provisions.

In 1954, following extensive investigations by a legislative committee and the State Attorney General, of both the State Board of Equalization, and the liquor industry generally in California, and amid charges of bribery, corruption and of failure to enforce the provisions of the Act, the people amended Article XX, § 22, of the California Constitution and removed the Board of Equalization as the en-

<sup>1</sup>Thus, California is an "open" State as opposed to a "monopoly" State where the State itself exercises a "monopoly" (to a greater or lesser degree varying from State to State) and is itself in the business of selling and distributing alcoholic beverages to the exclusion of the private sector.

<sup>2</sup>The California Alcoholic Beverage Control Act (Act) is Division 9 of the California Business & Professions Code, beginning with § 23000, in Chapter 1, and extending through § 25763, in Chapter 17.

forcement agency. The Department of Alcoholic Beverage Control (Department) was created by this same amendment as was a new State agency to review decisions of the newly-created enforcement agency. These new State agencies came into being on January 1, 1955.<sup>3</sup>

Section 25750 of the Act provides that the Department of Alcoholic Beverage Control "shall make and prescribe such reasonable rules as may be necessary or proper to carry out the purposes and intent of § 22 of Article XX of the Constitution and to enable it to exercise the powers and perform the duties conferred upon it by that section or by this division . . ."

The Board of Equalization before it, and the Department, since January 1, 1955, have promulgated various rules regulating alcoholic beverages.<sup>4</sup>

In addition to the statutes and rule relating to the setting of prices for wine at both the wholesale and retail level<sup>5</sup> which were specifically involved in the matter before the California Court of Appeal in this case, and the statute requiring the setting of prices for distilled spirits at the retail level<sup>6</sup> which was involved in an earlier California Supreme Court decision,<sup>7</sup> the Act contains numerous other provisions restricting, limiting and restraining the use, sale, delivery and possession of alcoholic beverages. Included are such matters as:

<sup>3</sup>Deering's California Codes Annotated, Constitution Article XX, § 22.

<sup>4</sup>See Title 4, California Administrative Code, Chapter 1, Rules 1 through 145.

<sup>5</sup>Sections 24862 and 24866 and Rule 101.

<sup>6</sup>Section 24755.

<sup>7</sup>*Rice v. Alcoholic Bev. etc. Appeals Board* (1978) 21 Cal.3d 431.

1. Restrictions on the number of retail on-sale and off-sale licenses (§§ 23816, 23817);
2. Tied-house restrictions generally separating the three levels of the industry from ownership ties (§§ 25500 through 25510);
3. Restrictions on advertising (§§ 25611.1, 25612);
4. Restrictions on discounts (§§ 24871, 24871.5, 24878);
5. Territorial restrictions and designations of trading areas (§ 25000.5, 24864);
6. Restrictions on the hours of operation of retail premises (§§ 25631 to 25633);
7. Limitations on credit and terms of payment between wholesalers and retailers (§ 25509).

In addition to these restrictions and restraints, other provisions of the Act require the seller of distilled spirits to retailers to set a selling price, post it with the Department and sell at that price (§ 24756). There is a similar statute with respect to the sale of beer from wholesale to retail (§ 25000).

By accusation dated August 15, 1978, the Department accused Midcal Aluminum, Inc., (MIDCAL) a wholesale distributor of wine,<sup>8</sup> of selling certain items of Gallo wine to a retailer "at prices less than the selling prices as posted in the then effective price schedule duly filed with the

<sup>8</sup>Dbas Gallo Wine Co., an affiliate of E & J Gallo Winery, and the Southern California distributor of Gallo wine. (See Joint Appendix, pp. 39, 40 and 46.)

Department by E & J Gallo Winery."<sup>9</sup> Midcal was also accused of selling certain items of Gallo wine for which there was "no effective price schedule or an effective fair trade contract duly filed with the Department." The accusation alleged that these actions by Midcal constituted violations of § 24862 of the Act and Rule 101 of the California Administrative Code. Section 24862 prohibits the sale of wine by a licensee "except at the selling or resale price thereof contained either in an effective price schedule or in an effective fair trade contract." The section further prohibits the sale to a consumer by a licensee of "any item of wine at less than the selling or resale price thereof contained either in an effective price schedule or in an effective fair trade contract." . . .

Rule 101 contains the same basic requirements, and in addition, outlines the procedures to be followed by the licensees in complying with both the statutes involved and the rule.<sup>10</sup>

On the same date as the accusation, Midcal and the Department entered into a stipulation in which Midcal admitted "the truthfulness of the facts as set forth in the Accusation." Midcal further stipulated that "the Department may, subject to a judicial determination of the constitutionality of § 24850, et seq. Business & Professions Code and Rule 101 of Chapter 1, Title 4, California Administrative Code, impose a monetary penalty or suspension of Respondent's licenses . . ."<sup>11</sup>

<sup>9</sup>See Joint Appendix, p. 16.

<sup>10</sup>See Appendix to Pet. Brief, p. A-7.

<sup>11</sup>See Joint Appendix, p. 19.

On August 18, 1978, Mideal filed a petition for writ of mandamus in the Court of Appeal in California, seeking to compel the Department "to dismiss the Accusation" against it and "to cease enforcement of the wine price-posting provisions of the Alcoholic Beverage Control Act and regulations adopted pursuant thereto."<sup>12</sup>

In an earlier case, in 1978, the California Supreme Court, in *Rice v. Alcoholic Bev. etc. Appeals Board*, 21 Cal.3d 431 (Rice), after having upheld the validity of the minimum consumer price provisions of § 24755 of the Act relating to distilled spirits on at least four previous occasions,<sup>13</sup> reversed its earlier position and declared that section invalid as violating the Sherman Antitrust Act (15 U.S.C. § 1).<sup>14</sup>

In *Rice*, a retailer sold distilled spirits to a consumer at prices less than the minimum prices established and filed with the Department. Basing its decision solely on federal grounds, and referring to the validity of § 24755 insofar as the effect of the Sherman Antitrust Act was concerned, the Court stated that "... When a statute enacted pursuant to the Twenty-first Amendment conflicts with an enactment

<sup>12</sup>See Joint Appendix, p. 3.

<sup>13</sup>*Allied Properties v. Department of Alcoholic Beverage Control* (1959) 53 Cal.2d 141, 346 P.2d 737; *Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control* (1966) 65 Cal.2d 349, 420 P.2d 735; *Samson Market Co. v. Alcoholic Bev. etc. Appeals Bd.* (1969) 71 Cal.2d 1215, 459 P.2d 667; *Big Boy Liquors, Ltd. v. Alcoholic Bev. etc. Appeals Bd.* (1969) 71 Cal.2d 1226, 459 P.2d 674.

<sup>14</sup>The *Rice* case is set forth in full beginning at Appendix C-1 through C-39 of the Petition for Certiorari herein.

based on the commerce clause, we must balance the policies furthered by each in order to determine which should prevail."<sup>15</sup>

The California Supreme Court concluded, "that the policies underlying the Sherman Act must prevail, and that the price maintenance provisions embodied in section 24755 are invalid."<sup>16</sup>

The California Supreme Court further held that even though the conduct of the brand owners in setting the minimum consumer prices was required by California law, and was enforced by State officials, nevertheless there was no immunity from the Sherman Act under the "state action" exemption. In that connection, the Court stated:

"... Thus, in our view, we would be extending the decisions of the United States Supreme Court beyond their intended design if we were to hold, as the Department urges, that this scheme is immune from the Sherman Act."<sup>17</sup>

The Director of the Department, Baxter Rice, did not seek a writ of certiorari from this Court and the decision became final.

The California Court of Appeal in the instant case determined that a writ of mandate should be issued directing the Department "to refrain from enforcing the fair trade and wine price posting provisions of the Alcoholic Beverage Control Act."<sup>18</sup> In reaching this conclusion, the Court of

<sup>15</sup>Appendix C-22, Pet. for Cert.

<sup>16</sup>Appendix C-39, Pet. for Cert.

<sup>17</sup>Appendix C-18, Pet. for Cert.

<sup>18</sup>Appendix A-10, Pet. for Cert.



Appeal relied upon the California Supreme Court's decision in *Rice*, and indicated that the result in the instant case was compelled by that decision:

"... The California Supreme Court carefully considered whether the California liquor price maintenance scheme was within the state action exception or saved by the Twenty-first Amendment, and concluded that neither exception applied. (*Rice*, supra, 21 Cal.3d at pp. 441-444, 447-457.) *We are bound by that decision.*" (Emphasis added.) (*Midcal Aluminum, Inc. v. Rice*, 90 Cal.App.3d 979, 984, fn. 4.)<sup>19</sup>

Petitioner CRLDA, is a trade association comprised of over 3,000 of the independent retail liquor establishments in California.<sup>20</sup>

Petitioner CRLDA sought and was granted leave to intervene in the proceeding before the California Court of Appeal and has participated in all stages of the proceedings. Following the decision by the Court of Appeal, petitioner CRLDA sought a rehearing which was denied.<sup>21</sup> CRLDA thereafter filed a petition for hearing with the California Supreme Court. That petition was denied, without comment, on May 24, 1979.<sup>22</sup>

Petitioner then applied for and was granted a stay of issuance of the peremptory writ of mandate from the Court of Appeal for the purpose of seeking the issuance of a writ of certiorari from this Court.<sup>23</sup> That stay was ex-

<sup>19</sup>Appendix A-7, Pet. for Cert.

<sup>20</sup>Joint Appendix, p. 39.

<sup>21</sup>Joint Appendix, p. 2.

<sup>22</sup>Appendix B, Pet. for Cert.

<sup>23</sup>Appendix G, Pet. for Cert.

tended by the Court of Appeal on June 27, 1979 to July 20, 1979.<sup>24</sup> On July 20, 1979, the Court of Appeal extended the stay "pending further order" of the Court.<sup>25</sup>

The Petition for Writ of Certiorari herein was filed with this Court on July 19, 1979. Certiorari was granted on October 1, 1979.

### SUMMARY OF THE ARGUMENT

The States have general police power to regulate matters concerning health, safety, welfare and morals. (Tenth Amendment.) The States have even broader police power in the regulating of liquor<sup>26</sup> within their borders. The "broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare and morals." (*California v. La Rue*, 409 U.S. 109.) Shortly prior to the enactment of the Wilson Act in 1890, this Court, in applying the Commerce Clause, limited the States' traditional police power. (*Leisy v. Hardin*, 135 U.S. 100.) The Wilson Act was intended to remove liquor from those Court-imposed restrictions of the Commerce Clause. (*Clark Distilling Co. v. Wes'n Md. Ry. Co.*, 242 U.S. 311.)

<sup>24</sup>Appendix H, Pet. for Cert.

<sup>25</sup>Joint Appendix, p. 54.

<sup>26</sup>The word "liquor" is used throughout this brief unless the context calls for identifying the type of alcoholic beverage involved. California constitutional and statutory provisions use "alcoholic beverages." The Webb-Kenyon Act and the Twenty-first Amendment use "intoxicating liquor." The cases use all three to describe the product.

The Webb-Kenyon Act was enacted in 1913 to expand the limited scope that had been accorded the Wilson Act. (*Clark case, supra.*) That Act's title sets forth with clarity its purpose:

"An Act Divesting intoxicating liquors of their interstate character in certain cases." (*Clark case, supra, at p. 321.*)

With the passage of the Webb-Kenyon Act, liquor was effectively removed from the restrictions of the Commerce Clause insofar as State regulation within its borders was concerned. (*Clark case, supra.*)

The States' power to regulate liquor within their borders was recognized as continuing throughout the Eighteenth Amendment (Prohibition) era. (*McCormick & Co. v. Brown*, 286 U.S. 131.)

On December 5, 1933, the Twenty-first Amendment was ratified with two basic effects:

- (1) The Eighteenth Amendment was repealed, and
- (2) The regulation of liquor for "delivery or use" within the State was placed squarely with the States and Congress' power to amend or repeal the effect of the Webb-Kenyon Act was removed. As has been stated by this Court on several occasions, the Webb-Kenyon Act was "constitutionalized." (*Craig v. Boren*, 429 U.S. 190, 205-206.)

Congress reenacted the Webb-Kenyon Act in 1935, thus emphasizing its continued vitality and further bolstering the broad effect of the Twenty-first Amendment. As recently as 1973, in *National Railroad Passenger Corp. v.*

*Miller*, 358 F.Supp. 1321 (D.C. Kan., 1973), summarily affirmed 414 U.S. 948, the continued existence of Webb-Kenyon was recognized.

Before the ratification of the Twenty-first Amendment, Congress had the power to regulate liquor within a State's borders under the Commerce Clause but for the Webb-Kenyon Act. (See *Clark, supra*; *McCormick, supra.*) Since the Twenty-first Amendment, Congress has no power to enact legislation, under the Commerce Clause, relating to liquor for "delivery or use" within a State where the State has enacted legislation which would either be in conflict with or inconsistent with the Federal legislation. This Court's decisions since have confirmed that the Amendment primarily created an exception to the normal operation of the Commerce Clause. (*Craig v. Boren, supra*; *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35.)

Prior to the Twenty-first Amendment, Congress could have repealed the Webb-Kenyon Act and taken control of the regulation of liquor within the States. The Twenty-first Amendment protects the States' rights to regulate liquor from interference by Congress once the State has undertaken to act. (*Castlewood Intern. Corp. v. Simon*, 596 F.2d 638.)

Under the Twenty-first Amendment, a State has the right to legislate concerning intoxicants brought from without the State for use and sale therein, unfettered by the Commerce Clause. (*Ziffrin, Inc. v. Reeves*, 308 U.S. 132.) A State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of

intoxicants designed for use, distribution, or consumption within its borders. (*Seagram & Sons* case, *supra*.)

The Sherman Act is a Federal statute enacted under the Commerce Clause, whereas the State statutes and regulations involved in this matter are enactments of the State, based both on the State's general police power and the Twenty-first Amendment. As was said in the *National Railroad Passenger Corp.* case, *supra*,

"... before a federal law may preempt state legislation, the federal statute must be free from constitutional infirmity. Constitutional amendments limit the power of Congress as well as that of the states when so considered. . . ." (See also concurring opinion of Justice Frankfurter in *U.S. v. Frankfort Distillers*, 324 U.S. 293.)

As was pointed out in *California v. La Rue*, *supra*, the previous decisions of this Court "... did not go so far as to hold or say that the Twenty-first Amendment supersedes all other provisions of the United States Constitution in the area of liquor regulations . . ."

If a State statute regulating liquor within its borders is challenged as being in conflict with either the Commerce Clause or Federal statutes enacted thereunder, such as the Sherman Act and the Rail Passenger Service Act, however, the State statute prevails under the Twenty-first Amendment. (*Seagram & Sons v. Hostetter*, *supra*; *National Railroad Passenger Corp. v. Miller*, *supra*.)

It has been suggested earlier in this case and in the *Rice* decision that in the case of *Hostetter v. Idlewild Liquor Corp.*, 377 U.S. 324, this Court held that the Commerce

Clause prevailed over the State liquor regulation. That case was decided under the provision in the Commerce Clause that confers upon Congress the power to "regulate commerce with foreign nations" as was pointed out in the *Hostetter* case "... this case does not involve measures aimed at preventing diversion or use of alcoholic beverages within New York . . . Rather the state has sought totally to prevent transactions carried on under the aegis of a law passed by Congress in the exercise of its explicit power under the Constitution to regulate commerce with foreign nations. This New York cannot constitutionally do." (*Hostetter v. Idlewild Liquor Corp.*, 377 U.S. 324, 334.)

The only areas where this Court has struck down State regulation in the liquor field were where the State provisions were contrary to other provisions of the Constitution and cases involving exclusive Federal jurisdiction over Federal enclaves such as national parks and military installations. The cases where it was held the statutes were contrary to other constitutional provisions involved violations of the Equal Protection Clause (*Craig v. Boren*, *supra*, different minimum drinking age for male and female); denial of the fundamental notice and hearing requirement of the Due Process Clause in connection with the public posting of names of persons who had engaged in excessive drinking (*Wisconsin v. Constantineau*, 400 U.S. 433); and violation of the Export-Import Clause (*Department of Rev. v. James Beam Distill. Co.*, 377 U.S. 341, where Kentucky imposed a tax on whiskey imported from Scotland while it remained in the unbroken packages in the hands of the original importer.)



The California Supreme Court in *Rice* in holding that the interests of the State liquor regulation must be "balanced" against the "policy" of the Sherman Act has rendered the Twenty-first Amendment meaningless. Such an interpretation would be contrary to the intention of the people of the United States when they repealed the Eighteenth Amendment, adopted the Twenty-first Amendment, and placed the regulation of liquor within a State's borders in the hands of the State and took away the power from Congress that it had prior to the Twenty-first Amendment, prior to the enactment of the Webb-Kenyon Act, to regulate liquor within a State.

The methods, procedures, restrictions and restraints by which a State determines to regulate liquor under the power granted it by the Twenty-first Amendment, the reserved power it possesses under the Tenth Amendment, its general police power and the "broader" police powers that a State possesses in the field of liquor regulation are all required by judicial precedent, national policy and reason to be left to the best judgment of the several State Legislatures. Although not involving liquor regulation, the recent decision by this Court in *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96, 111, recognizes this theme in discussing the "anticompetitive effect" of the California statute involved. The Court said:

"In this sense, there is a conflict between the statute and the central policy of the Sherman Act—'our charter of economic liberty' . . . Nevertheless, this sort of conflict cannot itself constitute a sufficient reason for invalidating the . . . statute. For if an adverse effect on competition were, in and of itself, enough to render a State statute invalid, the States' power to engage in economic regulation would be effectively destroyed."

The overturning of State regulatory provision under the Fourteenth Amendment as being violative of "substantive due process" has long since been repudiated by this Court as amounting to no more than the substitution of the judgment of the Courts for that of the Legislatures, therefore constituting judicial legislating. (*Ferguson v. Skrupa*, 372 U.S. 726, 729-730.)

In the *Rice* case, the California Supreme Court has simply substituted its concept of public policy and the wisdom of the California regulatory provisions involved for that of the California Legislature, and the result is contrary to the decisions of this Court involving State regulation under the Twenty-first Amendment.

The California regulatory provisions are likewise valid under the "state action" exemption to the Sherman Act. They are part of a comprehensive scheme of State regulation well within the legitimate aims and purposes of the State. (*New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, supra.) The alleged anticompetitive conduct complained of is "required" and "compelled" by the provisions of the statutes and rules involved. (*Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389; *Bates v. State Bar of Arizona*, 433 U.S. 350.) Cf. *Cantor v. Detroit Edison Co.*, 428 U.S. 579, where the alleged anti-competitive behavior was simply "authorized" by the State regulatory provisions and *Schwegmann Bros. v. Calvert Corp.*, 341 U.S. 384, where the statute (Miller-Tydings Act) was held to not even "authorize" the anti-competitive conduct.) The instant action seeks to restrain a public official from enforcing a State law. (*Parker v. Brown*, 317 U.S. 341.) In a word, all

of the criteria established by this Court for immunizing State regulatory provisions from the Sherman Act are present.

Whether the questions presented in this matter be considered in the light of the Twenty-first Amendment alone, whether they be considered in the light of the "state action" exemption alone, or whether the totality of the situation calls for the application of both, the California regulatory provisions are within the State's power to enact under the Twenty-first Amendment, are within the State's general police power and they are within the "state action" exemption to the Sherman Act.

**CALIFORNIA'S LEGISLATIVE SCHEME FOR SETTING PRICES FOR ALCOHOLIC BEVERAGES WITHIN ITS BORDERS IS VALID UNDER THE TWENTY-FIRST AMENDMENT AND DOES NOT VIOLATE THE SHERMAN ACT**

The basic question in this case is whether the California provisions regulating liquor within its borders violate the Sherman Antitrust Act. A State's power to enact economic regulatory legislation has not been seriously questioned since this Court, in 1934, upheld the New York regulatory scheme which set minimum prices for milk in *Nebbia v. People of the State of New York*, 291 U.S. 502 (1934).

As this Court observed in *Ferguson v. Skrupa*, 372 U.S. 726 (1963):

"The doctrine that prevailed in *Lochner*, *Coppage*, *Adkins*, *Burns*, and like cases—that due process

authorizes courts to hold laws unconstitutional when they believed the Legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgments of legislative bodies, who are elected to pass laws . . ." (Id. at p. 730.)

The most direct discussion of the State's power to regulate the price of liquor within its borders is found in Justice Frankfurter's concurring opinion in *U.S. v. Frankfort Distilleries*, 324 U.S. 293:

" . . . If a State for its own sufficient reasons deems it a desirable policy to standardize the price of liquor within its borders either by a direct price-fixing statute or by permissive sanction of such price-fixing in order to discourage the temptations of cheap liquor due to cutthroat competition, the Twenty-first Amendment gives it that power and the Commerce Clause does not gainsay it. Such State policy cannot offend the Sherman law even though distillers or middlemen agree with local dealers to respect this policy. . . ." (Id., p. 293.)

Since the States possess the power to enact economic regulations and since this Court long ago rejected the proposition "that due process authorizes courts to hold laws unconstitutional when they believe the Legislature has acted unwisely" the only potential impediment to a State enacting legislation regulating price in a field so peculiarly subject to State control is the Sherman Antitrust Act. In fact, in the California courts below, the sole ground for declaring the provisions involved invalid was the Courts' holding they violated the Sherman Act. (See, *Rice*

*v. Alcoholic Bev. etc. Appeals Bd.* (1978) 21 Cal.3d 431, Appendix to Petition for Cert. C-39; *Midcal Aluminum, Inc. v. Rice*, 90 Cal.App.3d 979, Appendix to Petition for Cert. A-9.)

Without engaging in a general and lengthy legal or philosophical discussion of the relative nature of the legislative powers possessed by the Federal government as opposed to the States, it can be agreed that the source of Congressional power to enact legislation is the United States Constitution, and its power to enact legislation of a regulatory nature generally is based on the Commerce Clause. It also requires no citation of authority to state that Congress' power to enact economic regulation, although based on the Commerce Clause, is limited by other provisions of the Constitution. It is further not open to dispute that a State's police power is generally reserved to it under the Tenth Amendment, and the State, in the exercise of its police power, is likewise subject to the provisions and restrictions of the United States Constitution. However, while a State, in enacting economic regulation under its general police power is generally subject to Constitutional restrictions, in the matter of the regulation of liquor within a State's borders the Twenty-first Amendment has removed that particular commodity from the effect of the Commerce Clause. (*Seagram & Sons v. Hostetter* (1966) 384 U.S. 35; *Craig v. Boren* (1976) 429 U.S. 190.) Thus, the States, while remaining subject to other provisions of the Constitution, are not subject to the Commerce Clause when it comes to regulating liquor within their borders because of the power granted them by the Twenty-first Amendment. (*U.S. v. Frankfort Distilleries*, 324 U.S. 293.)

That Congress, acting under the Commerce Clause, has the power to enact price legislation generally, without running afoul of other constitutional provisions is well illustrated by the extensive Federal regulatory programs involved in price setting for railroads, airlines, and the trucking industry to mention several.

It is also clear that a State, in the exercise of its economic regulatory powers, outside of the Twenty-first Amendment-protected liquor field, is subject to both the Commerce Clause and Congress' power to enact legislation pursuant thereto, such as the Sherman Act.

While the States' power to enact legislation under the Twenty-first Amendment which has an anticompetitive effect, including statutes authorizing "price-fixing", is well established as illustrated by the above quotation from Justice Frankfurter in the *Frankfort Distilleries* case, some question has been raised as to the effect on liquor regulation of the repeal in 1976 of the Miller-Tydings and McGuire Acts (50 Stat. 693 and 66 Stat. 632). (See, *Rice v. Alcoholic Bev. etc. Appeals Bd.*, Appendix Pet. for Cert. C-36.)

In the Miller-Tydings Act, Congress removed fair trade contracts setting minimum prices from the effects of the Sherman Act provided that the State had enacted legislation authorizing such contracts. The McGuire Act was a simple Congressional authorization of State legislation that permitted a non-signer to be bound by a fair trade contract between two other parties.

Before proceeding with a brief discussion of the background of those Acts and their effect, if any, on the present



situation, the Report of the Senate Judiciary Committee at the time that the two Acts were repealed is especially pertinent insofar as it affects state liquor "fair trade" regulation as opposed to general "fair trade" legislation by a state:

"Liquor will not be affected by the repeal of the fair trade laws in the same manner as other products because the Twenty-First Amendment to the Constitution gives the States broad powers over the sale of alcoholic beverages. Thus while repeal of the fair trade laws generally will prohibit manufacturers from enforcing resale prices, alcohol manufacturers may do so in States which pass price fixing statutes pursuant to the Twenty-First Amendment." (S.R. Rep. No. 466, 94th Cong., 1st Sess., p. 2 (1975); Reprinted in 1975 U.S. Code, Cong. & Admin. News, at pp. 1569, 1571.)

However, outside of the field of liquor regulation the Miller-Tydings and McGuire Acts had been made necessary by two cases from this Court, namely, *Dr. Miles Medical Co. v. Park & Son Co.*, 220 U.S. 373 (1910) and *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951). (Cf. with *Old Dearborn Co. v. Seagram*, 299 U.S. 183 (1936).)

This Court had pointed out that Congress could eliminate any problems it found to be present in the Court's declaration of invalidity of the fair trade contracts, by legislation:

"... If the rule so declared is believed to be harmful in its operation, the remedy may be found, as it has been sought, through application to the Congress..." *Old Dearborn Co. v. Seagram Corp.*, 299 U.S. 183, 191 (1936).

The Miller-Tydings Act was eventually enacted eliminating the effect of earlier court rulings.

In the *Schwegmann* case, *supra*, which arose after the Miller-Tydings Act had become effective, the question was the validity of a Louisiana *general* fair trade statute. It is particularly significant that the Louisiana statute was a general fair trade statute since the *Schwegmann* case in fact involved liquor distributors. The Louisiana statute contained a provision whereby "nonsigners" were bound by the price-fixing provisions of a fair trade contract entered into by others. The Miller-Tydings Act was silent on the question of the "non-signer." The *Schwegmann* case reviewed the legislative history, noted the absence of any provision authorizing non-signer provisions, and noted that just such a provision had been rejected during the legislative process. This Court simply held that it was not the Congressional intent in the Miller-Tydings Act to authorize the binding of non-signers by a fair trade contract.

On page 384, the Court made the holding of the case clear:

"In other words, since Congress was writing a law to meet the specifications of State law, it would seem that if the non-signer provision as well as the 'contract' provision of State law were to be written into Federal law, the pattern of the legislation would have been different."

Congressional passage of the McGuire Act authorizing the non-signer provisions followed the *Schwegmann* case and eliminated the effect of the *Schwegmann* case.

An analysis as to the proper role of the *Schwegmann* case, insofar as it might be construed to be a Twenty-first Amendment case rather than a simple interpretation of Congressional intent insofar as general fair trade laws are concerned, is found in the case of *Schwartz v. Kelly*, 99 A.2d 89, 140 Conn. 202 (1953).

At page 93 of the Atlantic Reporter, the Court correctly pointed out:

"In the second place, the Louisiana Fair Trade Act applied to branded goods of all kinds. The Act now before us applies only to branded intoxicating liquor. The difference is vital. The twenty-first amendment to the United States constitution provides in § 2: 'The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.' The effect of this is to override the limitations contained in the commerce clause of the federal constitution insofar as state legislation controlling the importation of intoxicating liquor is concerned. By virtue of the twenty-first amendment the states are free to enact laws prohibiting, restricting or regulating the bringing of intoxicating liquors into their territories completely unfettered by the commerce clause. . . ."

If the *Schwegmann* case had involved a Louisiana Statute, enacted under the Twenty-first Amendment, relating only to liquor, the *Schwegmann* case would be relevant here. However, it is clear that until a State has acted under the Twenty-first Amendment to enact provisions regulating liquor within its borders, Congressional legislation will be effective within the State in regulating commerce. Justice

Frankfurter, again in his concurring opinion in *U. S. v. Frankfort Distilleries*, supra, makes this point clear:

"... Of course, if a State chooses not to exercise the power given it by the Twenty-first Amendment and to continue to treat intoxicating liquors like other articles, the operation of the Commerce Clause continues. . . ."

Justice Frankfurter again emphasizes the source of the States' power and the interrelationships of the Twenty-first Amendment, the Sherman Act and the Commerce Clause, as he continues:

"... Since the Commerce Clause is subordinate to the exercise of State power under the Twenty-first Amendment, the Sherman law, deriving its authority from the Commerce Clause, can have no greater potency than the Commerce Clause itself. It must equally yield to State power drawn from the Twenty-first Amendment. And so, the validity of a charge under the Sherman law relating to intoxicating liquors depends upon the utilization by a State of its constitutional power under the Twenty-first Amendment. . . ."

The central issues in this case, and the need for review by this Court, were created by the California Supreme Court in its decision in *Rice v. Alcoholic Bev. etc. Appeals Bd.*, supra, and in the instant case where the California Court of Appeal felt "bound" to follow the *Rice* case. In the *Rice* case, there was a failure to correctly analyze the relationship between the Twenty-first Amendment and the Commerce Clause, a failure to analyze the relationship between the Webb-Kenyon and Wilson Acts and the Sherman Act, and a failure to correctly apply the decisions of this Court wherein challenges to State legislation under the Twenty-

of State regulation of liquor as opposed to other articles of commerce; there is a well defined body of judicial precedent by this Court detailing and describing the broad scope of the legislative power possessed by States in regulating liquor within their borders; and the relative status of Federal and State regulation of liquor is spelled out in the cases. The special reasons, justification and need for the exercise of this uniquely-bestowed power on the States have been discussed over and over again by this Court as well as numerous State and Federal courts.

The meaning, force and effect to be given the Twenty-first Amendment since its ratification in 1933 was first discussed in *State Board v. Young's Market Co.*, 299 U.S. 59 (1936), and has been periodically reviewed by this Court in the cases that have followed up to the most recent discussion in the case of *Craig v. Boren*, 429 U.S. 190 (1976).

Until the decision in the *Rice* case and the decision of the Court of Appeal in the instant case, there was no uncertainty in the unbroken string of judicial precedent from this Court defining the States' power under the Twenty-first Amendment. Indeed, until the *Rice* case, the California Supreme Court had no difficulty upholding California's liquor price control scheme. (See cases cited in footnote 13, page 8 of this brief.)

In *Seagram & Sons v. Hostetter*, 384 U.S. 35 (1966), this Court upheld a New York statute that required "price

and also that it was in conflict with the Sherman Act. (Id. at p. 45.) The statute is similar to that involved in the instant case in that it requires the posting of the price of liquor from the wholesaler to the retailer with the State Liquor Authority, and requires that the liquor be sold at the price so posted. It does not appear that any serious contention was made that the price posting provisions of the New York act violated the Sherman Act, the thrust being that the "price affirmation" requirement that distillers affirm that the price at which they were selling liquor to New York wholesalers was no higher than the price being charged in any other State was an "unconstitutional burden on interstate commerce" that would be outside the protection of the Twenty-first Amendment since the conduct being regulated could be argued to occur outside of the State of New York. However, it is significant that the Court upheld the statute and in so doing stated:

"... these provisions serve a clear and legitimate interest of New York in the exercise of its constitutional power to regulate the sale of liquor within its borders." (Id., p. 52.)

In the *Seagrams* case, this Court said:

"Consideration of any State law regulating intoxicating beverages must begin with the Twenty-first Amendment, the second section of which provides that: 'the transportation or importation to any State, Territory or possession of the United States for delivery



as follows:

"While the States, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power, the broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal State authority over public health, welfare, and morals."

This Court continued:

"In *Hostetter v. Idlewild Liquor Corp.*, 377 U.S. 324, 330 (1964), the Court reaffirmed that by reason of the Twenty-first Amendment 'a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders.' " (Id. at p. 114.)

The *National Railroad Passenger Corp. v. Miller* case, 358 F.Supp. 1321 (D.C.Kan. 1973), which was summarily affirmed by this Court at 414 U.S. 948, is particularly significant in this review for at least two reasons:

(1) It held that the Commerce Clause-based Rail Passenger Service Act (Amtrak, 45 U.S.C. § 501 et seq.) had to be interpreted so as to avoid conflict with a Kansas statute enacted under the Twenty-first Amendment, or the federal provision would be "unconstitutional"; and

Appendix to the Petition for Cert. at C-25, the California Supreme Court rejected the holding of the *National Railroad Passenger Corp.* case in the following language:

"The department's views as to the reach of the Twenty-first Amendment are supported by *National Railroad Passenger Corp. v. Miller* (D.Kan. 1973) 358 F.Supp. 1321, and by dictum in *Washington Brewers Institute v. United States* (9th Cir. 1943) 137 F.2d 964, decided a number of years before *Hostetter*. . . ."

The *National Railroad Passenger Corp.* case, in addition to being an excellent discussion of the Federal/State relationships in the field of liquor regulation and a thorough and careful analysis of the decisions of this Court, furnishes a clear guide as to the power of a State to regulate liquor within its borders as opposed to a statute enacted by Congress under the Commerce Clause. On page 1329, the Court explains:

"But before a federal law may preempt state legislation, the federal statute must be free from constitutional infirmity. Constitutional amendments limit the power of Congress as well as that of the states when so considered. A construction of 45 U.S.C. § 546(c) [Rail Passenger Act] which would forbid or prevent the enforcement of a state's regulatory liquor law under the guise of classifying the use and sale of liquor-by-the-drink as a 'service,' if so construed, would

an effort, had it been attempted, would be a clear violation of the Twenty-First Amendment. A statute will not be given a broad construction if its validity can be saved by a narrower one. *United States v. Walter*, 263 U.S. 15, 44 S.Ct. 10, 68 L.Ed. 137. So here, the word 'services' should not be construed to include the serving of intoxicating liquor within the boundaries of a State in violation of the State's regulatory act. *Otherwise, that part of the congressional act would be unconstitutional.*" (Emphasis added.)

The history of the treatment of liquor by government and the recognition of its unique character is helpful in recognizing the boundaries between the operation of the Commerce Clause and State regulation.

As was pointed out in *Craig v. Boren* (1976) 429 U.S. 190 at page 205:

"... In the *License cases*, 5 How. 504 579 (1847), the Court recognized a broad authority in State governments to regulate the trade of alcoholic beverages within their borders free from implied restrictions under the Commerce Clause."

This freedom from Commerce Clause restrictions enjoyed by the States continued until the 1888/1890 era when two cases by this Court affected the States' power to regulate liquor causing Congress to enact the Wilson Act (27 U.S.C. § 121). Justice Black, dissenting in *Hostetter v. Idlewild*

upheld state power over liquor, through *Bowman v. Chicago & N. R. Co.*, 125 U.S. 465 (1888), which Senator Borah said 'wiped out the Taney decision,' to *Leisy v. Hardin*, 135 U.S. 100 (1890), which made the States 'powerless to protect themselves against the importation of liquor into the States.'"

As Justice Brennan, writing the majority opinion in *Craig v. Boren* observed:

"... This led Congress, acting pursuant to its powers under the Commerce Clause, to reinvigorate the State's regulatory role through the passage of the Wilson and Webb-Kenyon Acts. See, e.g., *Clark Distilling Co. v. Western Maryland R. Co.*, 242 U.S. 311 (1917) (upholding Webb-Kenyon Act); *In re Rahrer*, 140 U.S. 545 (1891) (upholding Wilson Act). . . ." (Id at p. 205.)

A clear statement of the proposition that liquor was removed from the Commerce Clause by the Webb-Kenyon Act (27 U.S.C. § 122) is found in its title:

"An Act divesting intoxicating liquors of their interstate character in certain cases."

The case of *Clark Distilling Co. v. Wes'n Md. Ry. Co.*, 242 U.S. 311 (1917), discusses the background and meaning of both the Wilson and Webb-Kenyon Acts. The *Clark* case is significant since it was decided in 1917 prior to the

Act:

"... has so regulated interstate commerce as to give the State the power to do what it did in enacting the Prohibition law and cause its provisions to be applicable to shipments of intoxicants in interstate commerce, thus saving that law from repugnancy to the Constitution of the United States . . ." (Id. p. 321.)

On the significant question of a State government's power to regulate liquor, the *Clark* Court observed:

"That government can, consistently with the Due Process Clause, forbid the manufacture and sale of liquor and regulate its traffic, is not open to controversy; and that there goes along with this power full police authority to make it effective, is also not open . . ." (Id. at p. 320.)

The objective of the Wilson Act was explained as being to:

"... correct the great evil which was asserted to arise from the right to ship liquor into a State through the channels of interstate commerce and there receive and sell the same in the original package in violation of State prohibitions . . ." (Id. p. 323.)

commerce when the existing or future State laws forbade *sales* of intoxicants . . ." (Emphasis ours.) (Id. p. 323.)

The Webb-Kenyon Act was necessary, the Court explained, since the Wilson Act was limited in scope and therefore:

"... the right to receive liquor was not affected by the Wilson Act, [and] such *receipt* and the *possession* following from it and the resulting right to *use* remain protected by the Commerce Clause . . ." (Emphasis ours.) (Id. p. 323.)

After considering the impact of the Commerce Clause on State regulation of liquor under the cases necessitating the passage of the Wilson Act, and the cases construing the Wilson Act after its enactment in 1890, the *Clark* Court concluded:

"... there is no room for doubt that it [Webb-Kenyon Act] was enacted simply to extend that which was done by the Wilson Act, that is to say, its purpose was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in States contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws at naught . . ." (Id. p. 324.)



"The movement of liquor in interstate commerce and the receipt and possession and right to sell prohibited by the State law having been in express terms divested by the Webb-Kenyon Act of their interstate commerce character, it follows that if that Act was within the power of Congress to adopt, *there is no possible reason for holding that to enforce the prohibitions of the State law would conflict with the Commerce Clause of the Constitution; . . .*" (Emphasis added.) (Id. p. 325.)

It was argued to the *Clark* Court that these powers in the States to enact liquor legislation without regard to the Commerce Clause would cause serious disruptions in the constitutional power of the Congress under the Commerce Clause in connection with the other articles of commerce. The Court responded to that argument:

" . . . The want of force and the suggested inconvenience becomes patent by considering the principle which after all dominates and controls the question here presented, that is, the subject regulated and the extreme power to which that subject may be subjected. The fact that regulations of liquor have been upheld in numberless instances which would have been repugnant to the great guarantees of the Constitution but for the enlarged right possessed by government to regulate liquor, has never that we are aware of been taken as affording the basis for the thought that government might exert an enlarged power as to sub-

power may be constitutionally extended to things which it may not, consistently with the guarantees of the Constitution, embrace." (Emphasis added.) (Id. p. 332.)

In the case of *McCormick & Co. v. Brown*, 286 U.S. 131 (1932), decided shortly prior to the ratification of the Twenty-first Amendment in 1933, and during the time that the Eighteenth Amendment was effective, involved the question as to whether or not the Webb-Kenyon Act had been repealed by the Eighteenth Amendment. In holding that the Webb-Kenyon Act continued to have vitality throughout the Prohibition era, the Court stated:

"As the prohibitory legislation of the States may thus continue to have effective operation, there is no reason for denying to the Webb-Kenyon Act its intended application to prevent the immunity of transactions in interstate commerce from being used to impede the enforcement of the States' valid prohibitions." (Id., p. 141.)

In discussing the effectiveness of State prohibitory laws during Prohibition, the Court upheld their continued validity so long as they were not in conflict with the Eighteenth Amendment, the *McCormick* Court, in reflecting upon the State's police power generally, and implicitly recognizing the State's broad power to regulate liquor, stated:

" . . . Such laws derive their force not from that Amendment [Eighteenth] but from power originally

National Prohibition Act, having the effect of repealing the Webb-Kenyon Act.

As if to express its concurrence in the Federal-State relationships established by the Webb-Kenyon Act, and to recognize its continued vitality, Congress, in 1935, reenacted the Webb-Kenyon Act in its original form. (27 U.S.C.A. § 122.)

*Department of Rev. v. James B. Beam Distill. Co.*, 377 U.S. 341 (1964) involved the relationship between the Export-Import Clause and the Twenty-first Amendment, and therefore has no particular relevance to the instant case. However, the case does recognize the continued existence of the Wilson and Webb-Kenyon Acts and their significance.

In footnote 7, at page 345, the Court states:

“Prior to the Eighteenth Amendment Congress passed the Webb-Kenyon Act and the Wilson Act, giving the States a large degree of autonomy in regulating the importation and distribution of intoxicants. Those laws are still in force.”

And as recently as 1973, the three-judge court in *National Railroad Passenger Corp. v. Miller*, 358 F.Supp. 1321, summarily affirmed by this Court at 414 U.S. 948, discussed the Webb-Kenyon Act at page 1326 as follows:

was denied in the case of *Clark Distilling Co. v. Western Maryland Railway Co.*, 242 U.S. 311 at page 325 . . .”

The foregoing discussion of the history and source of power for State regulation of liquor is significant in its demonstration of the relationships between Congressional power under the Commerce Clause, and the State's power to regulate liquor under its general police power, the Webb-Kenyon Act and the Twenty-first Amendment.

The California Supreme Court in the *Rice* case did not mention the Webb-Kenyon Act. Petitioner submits that the Webb-Kenyon Act still plays an important role in making the relationships involving the constitutional and statutory provisions easily understood.

In *Craig v. Boren*, supra, this Court recognized that the Twenty-first Amendment expressed the “framers’ clear intention of Constitutionalizing the Commerce Clause” framework established under the Webb-Kenyon and Wilson Acts. This Court went on to state that:

“... This Court's decisions since have confirmed that the Amendment primarily created an exception to the normal operation of the Commerce Clause. See, e.g., *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 330 (1964); *Carter v. Virginia*, 321 U.S. 131, 139-140 (1944) (Frankfurter, J., concurring); *Finch & Co. v. McKittrick*, (sp?) 305 U.S. 395, 398 (1939).” (Id., p. 205-206)

*Liquor Corp.*, supra, at 332; c.f. *Department of Revenue v. James Beam Distilling Co.*, 377 U.S. 341 (1964); *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518 (1938)." (Id. at p. 206.)

This last quoted language from the *Craig* case is taken basically from the case of *Hostetter v. Idlewild Liquor Corp.*, supra, and has been argued to justify the "balancing" test first applied by the California Supreme Court in the *Rice* case. Such reliance by the *Rice* Court and respondent MidCal to support such a reweighing of the legislative propriety in enacting State liquor legislation is not supported by the cases decided by this Court under either the Twenty-first Amendment or the Webb-Kenyon Act.

In analyzing the statement of this Court in *Craig* regarding the effect of the Twenty-first Amendment on the Commerce Clause, it is helpful to consider the context in which the language was used in the *Idlewild* case itself.

In reading the *Idlewild* case, it is important to note that the Commerce Clause not only relates to interstate commerce but also to "foreign commerce." The *Idlewild* case involved an attempt by the State of New York to regulate what the Court concluded to be "foreign commerce" at the International Airport relating to the sale to foreign-bound airline passengers of alcoholic beverages intended for use and delivery at the foreign destination. Not surprisingly,

the Constitution to regulate commerce with foreign nations. This New York cannot constitutionally do."

It is interesting and of some significance in analyzing the power of the States under the Twenty-first Amendment, especially when the challenge is to either the Commerce Clause or a statute enacted under its power, to note that Justices Black and Goldberg dissented from the majority opinion invalidating the New York statute on the grounds that the Twenty-first Amendment conferred upon the States the power to regulate even this commerce which the majority had characterized as "foreign" commerce.

To further demonstrate the context of the discussion in *Idlewild* that the Twenty-first Amendment had "repealed" the Commerce Clause, one need only consider the effect ascribed to such a contention by the Court:

" . . . If the Commerce Clause had been *pro tanto* 'repealed', then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor . . ." (Id., at p. 332)

The *Idlewild* Court pointed out that in the case of *Jamison & Co. v. Morgenthau*, 307 U.S. 171, "the Federal Alcohol Administration Act was attacked upon the ground that the Twenty-first Amendment to the Federal Constitution gives to the States complete and exclusive control over commerce in intoxicating liquors, unlimited by the Com-



merce Clause, and hints that Congress has no longer authority to control the importation of these commodities into the United States." (Id. at p. 332)

It is unlikely that anyone would seriously quarrel with the analysis of the *Idlewild* Court with respect to the effect of the Twenty-first Amendment upon the Commerce Clause as described.

This Court in the *Craig* case, *supra*, in discussing that language from the *Idlewild* case, recognizes that there are instances in which the interests under certain constitutional provisions, Federal/State relationships, and State regulation of liquor, are to be inquired into rather than simply deferring to the State's power to regulate liquor under the Twenty-first Amendment "unfettered by the Commerce Clause." That is implicit in the Court's citation of the two additional cases besides the *Idlewild* case, namely, the *Department of Revenue v. James B. Beam Distilling Co.* and *Collins v. Yosemite Park & Curry Co.* cases.

The *Department of Revenue* case involved a conflict between the Export-Import Clause of the United States Constitution and a State liquor regulation. The *Collins* case involved an attempt by the State of California to impose a liquor regulation within the boundaries of Yosemite National Park. This Court, in the *Idlewild* case, at page 324, explained the *Collins* case thusly:

"... But the Court held that California could not prevent completely the transportation of the liquor across the State's territory for delivery and use in a Federal enclave within it."

The Federal-State relationships under the Commerce Clause and Twenty-first Amendment are perhaps no better illustrated than in the recent case of *Castlewood Intern. Corp. v. Simon*, 596 F.2d 638 (5th Cir., 1979). In *Castlewood*, a regulation of the Bureau of Alcohol, Tobacco & Firearms required a reasonable relationship between a discount on liquor and cost. On the other hand, a Florida statute required no such relationship. The Florida Supreme Court had held that:

"... under Florida law a wholesaler may sell to a retailer on the basis of a discount given at the time of sale and made available to all vendors buying similar quantities, regardless of laid-in costs or the savings attributable to quantity sales." (Id. at p. 641.)

In holding that the State law prevailed over the Federal regulation, and in referring to the Twenty-first Amendment, the Court of Appeals pointed out:

"... That section is unique in the constitutional scheme in that it represents the only express grant of power to the states, thereby creating a fundamental restructuring of the constitutional scheme as it relates to one product—intoxicating liquors." (Citing *California v. La Rue*, *supra*.) (Id. at p. 642.) The Court continued:

"Thus, any analysis of the validity of a state statute regulating liquor does not proceed via the traditional route for testing the constitutionality of state statutes. We must proceed from a vantage point of presumed state power and then ask whether there are any limitations to that power, always keeping in mind that where intoxicating liquors are concerned, great deference must be accorded a comprehensive state regulatory scheme." (Id., at p. 642.)

In *Castlewood*, the government was arguing that the Federal Alcoholic Administration Act (27 U.S.C. § 201 et seq.) pursuant to which the federal regulations challenged were promulgated should prevail due to the Supremacy Clause of the Constitution. The *Castlewood* court pointed out that:

"Federal laws have prevailed over state regulation of intoxicating liquors in only two circumstances: 1) Where the state regulation was repugnant to overriding national concern with due process and equal protection, and 2) where the state has sought to invade an area of exclusive federal concern, such as federally owned installations, regulation of commerce with foreign nations, and taxation of imports from foreign countries. . . ." (Id., at p. 642.)

In support of this well recognized principle, the Court cites the several leading cases in which the Twenty-first Amendment and constitutional provisions other than the Commerce Clause regulating commerce within a State were involved. In that connection, the Court cited *Wisconsin v. Constantineau*, 400 U.S. 433 (1970) [due process requirement of hearing]; *Craig v. Boren*, 429 U.S. 190 (1976) [classification based upon sex, denial of equal protection]; *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518 (1938) [State cannot regulate liquor on a federal enclave]; *Hos-tetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964) [foreign commerce]; *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964) [Export-Import Clause].

Since the regulatory provisions involved in both the *Rice* case and the instant case are well within the State's power to enact under the Twenty-first Amendment, and

since reason, logic and judicial precedent support the proposition that States should be free to regulate liquor within their borders in the manner chosen by the States "unfettered by the Commerce Clause" and since these regulatory provisions do not run afoul of any other constitutional provision, they are valid and this Court should so rule.

**CALIFORNIA'S LEGISLATIVE SCHEME FOR SETTING PRICES FOR ALCOHOLIC BEVERAGES WITHIN ITS BORDERS IS VALID UNDER THE "STATE ACTION" EXEMPTION TO THE SHERMAN ACT**

In rejecting the "state action" exemption to the Sherman Act, the California Supreme Court in *Rice* has ruled directly contrary to the holdings of the leading cases of this Court setting forth the parameters of the "state action" exemption.

The determination of the validity of the California regulatory provisions involved are amply supported by the application of the Twenty-first Amendment. However, the situation in the instant case is a classic example of where the "state action" exemption clearly applies to a State regulatory scheme. (Petitioner would suggest that because of the "broader" scope of State police power under the Twenty-first Amendment and the fact that the State's regulatory programs under that same Amendment are "unfettered by the Commerce Clause", that a decision upholding the application of the "state action" exemption in a liquor case may suffer slightly in its precedential value as applied in areas outside of the liquor field.)

In a case decided by this Court after the *Rice* decision, this Court upheld a California statute that allowed a protest to be filed by an existing motor vehicle dealer to the issuance of a new franchise within his territory by an automobile manufacturer. This Court recognized the anticompetitive nature of the California provisions, and that the regulatory scheme was "clearly articulated and affirmatively expressed, [and] designed to displace unfettered business freedom" and was "outside the reach of the antitrust laws under the 'state action' exemption." (*New Motor Vehicles Bd. of Cal. v. Orrin W. Fox Co.* (1978) 439 U.S. 96, 109.)

The "clearly articulated and affirmatively expressed" nature of the California provisions regulating liquor, and in particular those involved in the instant case, cannot be denied. Nor can it be denied that one of the purposes of the California regulations is the "protection of small business." (See *Allied Properties v. Dept. of Alcoholic Beverage Control*, 53 Cal.2d 141; 346 P2d 737.) This Court, in the *Fox* case, recognized that the regulatory act involved in that case "protects the equities of existing dealers by prohibiting automobile manufacturers from adding dealerships to the market areas of its existing franchisees where the effect of such intra-brand competition would be injurious to the existing franchisees and to the public interest." (*New Motor Vehicles Bd. of Cal. v. Orrin W. Fox Co.* (1978) 439 U.S. 96, 102.)

That the California provisions serve a similar purpose in addition to that of promoting temperance is demonstrated by the provisions of § 24749 of the California Alcoholic

Beverage Control Act, wherein it is declared as a matter of legislative policy:

"It is declared policy of the State that it is necessary to regulate and control the manufacture, sale, and distribution of alcoholic beverages within this State for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to the law. In order to eliminate price wars which unduly stimulate the sale and consumption of alcoholic beverages and disrupt the orderly sale and distribution thereof, it is hereby declared as the policy of this State that the sale of alcoholic beverages shall be subjected to certain restrictions and regulations. The necessity for the enactment of provisions of this chapter is, therefore, declared as a matter of legislative determination."

The comprehensive and detailed nature of the California regulatory scheme for controlling the sale, distribution, possession and use of liquor in California is described in this brief under the heading STATEMENT OF THE CASE. Suffice it to say that the California scheme is comprehensive, detailed, clearly articulated and affirmatively expressed.

Another comprehensive California regulatory scheme was involved in the case of *Parker v. Brown* (1942) 317 U.S. 341. This case is perhaps the leading case on the question, and upheld the regulatory program against the contention that it violated the Sherman Act. In the marketing program set up by the California Legislature, raisin growers and state officials collectively, through a system of grower-initiated proposals, administrative hearings and grower acceptance



or rejection of the final marketing program, established minimum prices for raisins in the districts in which the growers had first petitioned for and then agreed to the plan. In upholding the California regulatory provisions, this Court held that the anticompetitive program was exempt from the Sherman Act based on the "state action" exemption. A further similarity between the *Parker* case and the instant case is the fact that in *Parker*, as in the instant case, the attempt was made to restrain a state official from performing his duty in enforcing the State law.

It has been suggested that if the alleged anticompetitive behavior is simply "authorized" rather than "required" or "compelled" by the State, that the "state action" exemption would not apply. (*Cantor v. Detroit Edison Co.*, 428 U.S. 579 and *Schwegmann Bros. v. Calvert Corp.*, 341 U.S. 384.)

Since, as pointed out earlier in this brief, the *Schwegmann* case involved liquor distributors, and therefore it has been suggested that the case might be construed as a Twenty-first Amendment case for the reasons given heretofore, such was not the case. Additionally, the *Schwegmann* case is also not a "state action" case since the question in the case, as discussed in the preceding section of this brief, was not whether the conduct was "authorized", but whether or not the Miller-Tydings Act had legalized "non-signer" provisions at all.

Since the *Fox* case, there would seem to be no question as to the validity of the California provisions involved in this matter insofar as their validity under the "state action" exemption is concerned, if indeed there ever was.

In view of the comprehensive nature of the California regulatory scheme, the fact that the subject of the regulation is liquor, and that the alleged anticompetitive behavior is "required" by the provisions involved, no useful purpose would appear to be served by a detailed analysis of the several cases involving the "state action" exemption. However, Petitioner would respectfully refer this Court to its Petition for Writ of Certiorari herein, beginning at page 22 for a more detailed analysis of the applicable cases.

It is doubtful that a more persuasive case for the application of the "state action" exemption could be made than under the facts and the statutory provisions involved in this case. We would therefore respectfully urge this Court to not only hold the California provisions valid under the Twenty-first Amendment, but under the "state action" exemption as well.

### CONCLUSION

For all of the foregoing reasons, this Court should hold the California regulatory provisions to be valid.

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**Appendix Follows**

## APPENDIX

## APPENDIX

### STATUTES INVOLVED

United States Constitution, Article I, § 8, cl. 3 (Commerce Clause)

§ 8. The Congress shall have Power[:]

[cl 3] To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes;

United States Constitution:

Twenty-first Amendment, Sections 1 and 2

#### Amendment 21

§ 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

§ 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

California Constitution:

Article XX, Section 22

§ 22. [Alcoholic beverages control]

The State of California, subject to the internal revenue laws of the United States, shall have the exclusive right and power to license and regulate the manufacture, sale, purchase, possession and transportation of alcoholic beverages within the State, and subject to the laws of the United States regulating commerce between foreign nations and among the states shall



have the exclusive right and power to regulate the importation into and exportation from the State, of alcoholic beverages. In the exercise of these rights and powers, the Legislature shall not constitute the State or any agency thereof a manufacturer or seller of alcoholic beverages.

All alcoholic beverages may be bought, sold, served, consumed and otherwise disposed of in premises which shall be licensed as provided by the Legislature. In providing for the licensing of premises, the Legislature may provide for the issuance of, among other licenses, licenses for the following types of premises where the alcoholic beverages specified in the licenses may be sold and served for consumption upon the premises:

- (a) For bona fide public eating places, as defined by the Legislature.
- (b) For public premises in which food shall not be sold or served as in a bona fide public eating place, but upon which premises the Legislature may permit the sale or service of food products incidental to the sale and service of alcoholic beverages. No person under the age of 21 years shall be permitted to enter and remain in any such premises without lawful business therein.
- (c) For public premises for the sale and service of beers alone.
- (d) Under such conditions as the Legislature may impose, for railroad dining or club cars, passenger

ships, common carriers by air, and bona fide clubs after such clubs have been lawfully operated for not less than one year.

The sale, furnishing, giving, or causing to be sold, furnished, or giving away of any alcoholic beverage to any person under the age of 21 years is hereby prohibited, and no person shall sell, furnish, give, or cause to be sold, furnished, or given away any alcoholic beverage to any person under the age of 21 years, and no person under the age of 21 years shall purchase any alcoholic beverage.

The Director of Alcoholic Beverage Control shall be the head of the Department of Alcoholic Beverage Control, shall be appointed by the Governor subject to confirmation by a majority vote of all of the members elected to the Senate, and shall serve at the pleasure of the Governor. The director may be removed from office by the Governor, and the Legislature shall have the power, by a majority vote of all members elected to each house, to remove the director from office for dereliction of duty or corruption or incompetency. The director may appoint three persons who shall be exempt from civil service, in addition to the person he is authorized to appoint by Section 4 of Article XXIV.

The Department of Alcoholic Beverage Control shall have the exclusive power, except as herein provided and in accordance with laws enacted by the Legislature, to license the manufacture, importation and sale of alcoholic beverages in this State, and to collect license fees or occupation taxes on account thereof. The department shall have the power, in its discretion, to

deny, suspend or revoke any specific alcoholic beverage license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals, or that a person seeking or holding a license has violated any law prohibiting conduct involving moral turpitude. It shall be unlawful for any person other than a licensee of said department to manufacture, import or sell alcoholic beverages in this State.

The Alcoholic Beverage Control Appeals Board shall consist of three members appointed by the Governor, subject to confirmation by a majority vote of all of the members elected to the Senate. Each member, at the time of his initial appointment, shall be a resident of a different county from the one in which either of the other members resides. The members of the board may be removed from office by the Governor, and the Legislature shall have the power, by a majority vote of all members elected to each house, to remove any member from office for dereliction of duty or corruption or incompetency.

When any person aggrieved thereby appeals from a decision of the department ordering any penalty assessment, issuing, denying, transferring, suspending or revoking any license for the manufacture, importation, or sale of alcoholic beverages, the board shall review the decision subject to such limitations as may be imposed by the Legislature. In such cases, the board shall not receive evidence in addition to that considered by the department. Review by the board of a decision of

the department shall be limited to the questions whether the department has proceeded without or in excess of its jurisdiction, whether the department has proceeded in the manner required by law, whether the decision is supported by the findings, and whether the findings are supported by substantial evidence in the light of the whole record. In appeals where the board finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the department it may enter an order remanding the matter to the department for reconsideration in the light of such evidence. In all other appeals the board shall enter an order either affirming or reversing the decision of the department. When the order reverses the decision of the department, the board may direct the reconsideration of the matter in the light of its order and may direct the department to take such further action as is specially enjoined upon it by law, but the order shall not limit or control in any way the discretion vested by law in the department. Orders of the board shall be subject to judicial review upon petition of the director or any party aggrieved by such order.

A concurrent resolution for the removal of either the director or any member of the board may be introduced in the Legislature only if five Members of the Senate, or 10 Members of the Assembly, join as authors.

Until the Legislature shall otherwise provide, the privilege of keeping, buying, selling, serving, and otherwise disposing of alcoholic beverages in bona fide

hotels, restaurants, cafes, cafeterias, railroad dining or club cars, passenger ships, and other public eating places, and in bona fide clubs after such clubs have been lawfully operated for not less than one year, and the privilege of keeping, buying, selling, serving, and otherwise disposing of beers on any premises open to the general public shall be licensed and regulated under the applicable provisions of the Alcoholic Beverage Control Act, insofar as the same are not inconsistent with the provisions hereof, and excepting that the license fee to be charged bona fide hotels, restaurants, cafes, cafeterias, railroad dining or club cars, passenger ships, and other public eating places, and any bona fide clubs after such clubs have been lawfully operated for not less than one year, for the privilege of keeping, buying, selling, or otherwise disposing of alcoholic beverages, shall be the amounts prescribed as of the operative date hereof, subject to the power of the Legislature to change such fees.

The State Board of Equalization shall assess and collect such excise taxes as are or may be imposed by the Legislature on account of the manufacture, importation and sale of alcoholic beverages in this State.

The Legislature may authorize, subject to reasonable restrictions, the sale in retail stores of alcoholic beverages contained in the original packages, where such alcoholic beverages are not to be consumed on the premises where sold; and may provide for the issuance of all types of licenses necessary to carry on the activities referred to in the first paragraph of this section, including, but not limited to, licenses necessary for the

manufacture, production, processing, importation, exportation, transportation, wholesaling, distribution, and sale of any and all kinds of alcoholic beverages.

The Legislature shall provide for apportioning the amounts collected for license fees or occupation taxes under the provisions hereof between the State and the cities, counties and cities and counties of the State, in such manner as the Legislature may deem proper.

All constitutional provisions and laws inconsistent with the provisions hereof are hereby repealed.

The provisions of this section shall be self-executing, but nothing herein shall prohibit the Legislature from enacting laws implementing and not inconsistent with such provisions.

#### California Administrative Code, Title 4

##### Rule 101 (a) (b)

101. Wine Price Schedules. (a) Selling and Resale Prices. (1) No licensee licensed to sell wine to retailers for resale shall so sell, and no retailer shall buy, any package or item of wine at a price other than the effective price established in a "wine resale and/or selling price schedule" and fair trade contract duly filed with the department.

(2) No licensee licensed to sell wine to consumers for consumption off the premises where sold shall so sell any package or item of wine at a price less than the effective minimum retail price of such package or item set forth in a "wine resale and/or selling price sched-



ule" and fair trade contract duly filed with the department, unless written permission is granted by the department.

(b) Posting of Prices. (1) Every licensed owner, or person in control of a brand, trademark or name appearing on a package or item of wine which is to be sold for consumption off the licensed premises in California, must file with the department a "wine resale and/or selling price schedule" containing the minimum bottle prices to consumers for every item carrying that brand, trademark or name. Prices so posted shall be minimum prices, and may differ for the different trading areas within this State.

A retail licensee who owns or controls a brand, trademark or name appearing on a package or item of wine, and who is required to post selling prices to consumers as required by Section 24868, may authorize the wholesaler, winegrower, wine rectifier or rectifier who posts case prices to retailers on such item or items to post the minimum bottle prices to consumers by filing written authorization with the department.

(2) Every licensed owner or person in control of a brand, trademark or name appearing on a package or item of wine which is to be sold to retailers for resale must file with the department a fair trade contract with each class of licensee to whom the wine will be sold or resold (for example, wholesalers and retailers), accompanied by a brand schedule setting forth in detail with respect to each brand owned or controlled, the brand name, secondary brand name and form of label,

and must file with the department a "wine resale and/or selling price schedule" containing the specified or minimum basic case prices to retailers for each item of wine carrying that brand, trademark or name. Prices so posted shall be specified prices in the Northern and Southern Trading Areas, and minimum prices in the Mountain Trading Area, and different prices may be posted for each of the respective trading areas. Prices posted may be f.o.b. selling premises or delivered or both.

#### 15 U.S.C. §§ 1, 2 (Sherman Act)

§ 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceed-

ing three years, or by both said punishments, in the discretion of the court.

27 U.S.C. § 122 (Webb-Kenyon Act)

§ 122. Shipments into states for possession or sale in violation of state law. The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited. (Mar. 1, 1913, c. 90, 37 Stat. 699; Aug. 27, 1935, c. 740, § 202 (b), 49 Stat. 877.)

Alcoholic Beverage Control Act:

(California Business & Professions Code, § 24862)

24862. Compliance with price schedules and fair trade contracts.

No licensee shall in this state sell or resell to a retailer, and no retailer shall in this state buy any item

of wine except at the selling or resale price thereof contained either in an effective price schedule or in an effective fair trade contract as authorized by Chapter 10 of this division, unless otherwise provided in this chapter.

No licensee in this state shall sell or resell to a consumer any item of wine at less than the selling or resale price thereof contained either in an effective price schedule or in an effective fair trade contract as authorized by Chapter 10 (commencing with Section 24749) of this division unless otherwise provided in this chapter.

Wine sold pursuant to a bona fide order accepted on the last business day of any month may be delivered to the purchaser, at the price in effect during said month, within two business days immediately following the last day of the month in which the sale was made.

Alcoholic Beverage Control Act:

(California Business & Professions Code, § 24866)

24866. Price schedules and fair trade contracts: Growers, wholesalers, and rectifiers.

Each wine grower, wholesaler licensed to sell wine, wine rectifier, and rectifier shall:

(a) Post a schedule of selling prices of wine to retailers or consumers for which his resale price is not governed by a fair trade contract made by the person who owns or controls the brand.

(b) Make and file a fair trade contract and file a schedule of resale prices, if he owns or controls a brand of wine resold to retailers or consumers.

Alcoholic Beverage Control Act:

(California Business & Professions Code, § 24755)

This section is set forth in part insofar as it is relevant in this proceeding in footnote 1, appendix C-2 and 3 of the Petition for Writ of Certiorari filed herein.



DEC 21 1979

MICHAEL RODAK, JR., CLERK

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**In the Supreme Court**  
OF THE  
**United States**

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OCTOBER TERM, 1979

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**No. 79-97**

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CALIFORNIA RETAIL LIQUOR DEALERS ASSOCIATION,  
*Petitioner*

v.

MIDCAL ALUMINUM, INC.,  
*Respondent*

BAXTER RICE as Director of the  
Department of Alcoholic Beverage Control  
of the State of California,  
*Respondent*

---

**On Writ of Certiorari to the Court of Appeal of the  
State of California, Third Appellate District**

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**BRIEF FOR RESPONDENT  
MIDCAL ALUMINUM, INC.**

---

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## SUBJECT INDEX

	<u>Page</u>
Question presented .....	1
Statement .....	2
I The state statutes, governmental entities, and parties involved .....	3
A. State statutes .....	3
B. State governmental entities .....	4
C. Parties .....	6
II The series of decisions by state governmental entities leading up to the decision below .....	7
A. Background .....	7
B. Recommendations for ending alcoholic beverage RPM .....	8
C. The Corsetti decision .....	10
1. The ABC Appeals Board .....	10
2. The California Supreme Court .....	10
D. Post-Corsetti decisions by state governmental entities .....	11
E. The Capiscean decision .....	16
III The proceedings below .....	17
Summary of argument .....	19

## SUBJECT INDEX

	<u>Page</u>
Argument .....	24
Introductory .....	24
I The wine RPM provisions in dispute contravene the antitrust laws .....	28
A. The wine RPM provisions compel price fixing for- bidden by federal law .....	28
B. Congress did not exclude alcoholic beverages from the 1975 repeal of the federal fair trade exemption from the antitrust laws .....	29
II The Wilson and Webb-Kenyon Acts provide no ground for reversal in this case, on the merits and because they were not properly presented by petitioner. As di- rect predecessors of § 2 of the Twenty-first Amend- ment, their real significance is to illuminate the lim- ited purpose of § 2 .....	33
A. Petitioner cannot espouse the Wilson and Webb- Kenyon Acts as grounds for reversal in this Court .....	33
B. On the merits, the Wilson and Webb-Kenyon Acts provide no support to petitioner. Their sole sig- nificance is to illuminate the narrow historical background of § 2 of the Twenty-first Amendment .....	33
III In this instance the correct accommodation of § 2 of the Twenty-first Amendment and the Commerce and Supremacy Clauses is recognition of the prevalence of the federal antitrust laws .....	41
A. The central purpose of § 2 of the Twenty-first Amendment was to help dry states remain dry ..	41
B. This Court's decisions confirm that § 2 does not eviscerate the Commerce Clause powers of Con- gress over matters of substantial national concern ..	52
C. This Court has never held the federal antitrust laws to be preempted by state liquor regulation ..	55
D. The correct accommodation of competing state and federal interests is recognition of the preva- lence of the federal antitrust laws .....	57

## SUBJECT INDEX

	<u>Page</u>
IV The state action doctrine does not save the RPM pro- visions from invalidation under the Sherman Act .....	61
A. Congress plainly intended the Sherman Act to ban the RPM activity at issue, and thus the state ac- tion doctrine does not apply .....	61
B. Even if the Parker doctrine applies to this case, the RPM provisions do not meet the doctrine's requirements .....	63
1. The Parker doctrine is not satisfied because of the state's failure to supervise the prices set by private parties .....	64
2. The RPM provisions are not necessary to the success of the state's regulatory system and therefore do not qualify for a Parker exemp- tion .....	68
3. The harms resulting from California's RPM scheme outweigh the benefits, and a Parker exemption is therefore inappropriate .....	69
Conclusion .....	70



## TABLE OF AUTHORITIES CITED

Cases	Page
Adams Express Co. v. Kentucky, 206 U.S. 129 (1907) .....	37
Allied Properties v. ABC, 53 Cal. 2d 141 (1959) .....	10
American Express Co. v. Iowa, 196 U.S. 133 (1905) .....	37
Bates v. State Bar of Arizona, 433 U.S. 350 (1977) .....	64
Bernhard v. Bank of America, 19 Cal. 2d 807 (1942) .....	26
Bowman v. Chicago & Northwestern Ry. Co., 125 U.S. 465 (1888) .....	34
Brown v. Maryland, 12 Wheat. 419 (1827) .....	35, 41
Burke v. Ford, 389 U.S. 320 (1967) .....	55
California v. LaRue, 409 U.S. 100 (1972) .....	42, 54
California v. Taylor, 353 U.S. 553 (1957) .....	33
California v. Washington, 358 U.S. 64 (1958) .....	55
Cantor v. Detroit Edison Co., 428 U.S. 579 (1976) ....	62, 65, 68, 69
Capiscean Corp. v. ABC Appeals Board and ABC, 87 Cal. App. 3d 996 (1979) .....	15, 16, 17, 18, 24, 25, 26
Carter v. Virginia, 321 U.S. 131 (1944) .....	53
Castlewood Int'l Corp. v. Simon, 596 F.2d 638 (5th Cir. 1979) ..	60
Chern v. Bank of America, 15 Cal. 3d 866 (1976) .....	27
City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978) .....	61, 70
City of Los Angeles v. City of San Fernando, 14 Cal. 3d 199 (1975) .....	27
Clark Distilling Co. v. Western Maryland Ry. Co., 242 U.S. 311 (1917) .....	39, 40, 45
Craig v. Boren, 429 U.S. 190 (1976) .....	42, 54, 55
Dept. of Rev. v. James B. Beam Distilling Co., 377 U.S. 341 (1964) .....	53
Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911) .....	28
Duckworth v. Arkansas, 314 U.S. 390 (1941) .....	55
Exxon v. Governor of Maryland, 437 U.S. 117 (1978) .....	69
Finch v. McKittrick, 305 U.S. 395 (1939) .....	52

## TABLE OF AUTHORITIES

CASES	Page
Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) .....	63, 64
Hanf v. United States, 235 F.2d 710 (8th Cir.), cert. denied, 352 U.S. 880 (1956) .....	51
Heublein, Inc. v. So. Car. Tax Comm'n, 409 U.S. 275 (1972) ..	57
Heyman v. Southern Ry. Co., 203 U.S. 270 (1906) .....	37
Hollywood Circle, Inc. v. ABC, 55 Cal. 2d 728 (1961) .....	27
Hospital Building Co. v. Rex Hospital Trustees, 425 U.S. 738 (1976) .....	61
Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964) .....	48, 53, 54, 57
In re Capiscean Corp., AB-4490 (1978) .....	6, 15
In re Corsetti, AB-4311 (1976) .....	10, 57, 66, 69
In re Ferrigno, AB-4637 (1979) .....	6
Indianapolis Brewing Co. v. Liquor Control Comm'n, 305 U.S. 391 (1939) .....	52
Jatros v. Bowles, 143 F.2d 453 (6th Cir. 1944) .....	59
Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35 (1966) .....	9, 53, 56, 57
Lamp Liquors, Inc. v. Adolph Coors Co., 563 F.2d 425 (10th Cir. 1977) .....	44, 56
Leisy v. Hardin, 135 U.S. 100 (1890) .....	34, 35, 36, 41, 45, 46
Mahoney v. Joseph Triner Corp., 304 U.S. 401 (1938) .....	52
Midcal Aluminum, Inc. v. Rice, Director of ABC, 90 Cal. App. 3d 979 (1979) .....	18
National Railroad Passenger Corp. v. Miller, 358 F. Supp. 1321 (D. Kan.), aff'd, 414 U.S. 948 (1973) .....	40
New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96 (1978) .....	67, 69
Nippert v. City of Richmond, 327 U.S. 416 (1946) .....	55
Norman's on the Waterfront, Inc. v. Wheatley, 444 F.2d 1011 (3d Cir. 1971) .....	62, 67
Parker v. Brown, 317 U.S. 341 (1943) .....	61, 63, 64, 65, 66, 67, 68, 69, 70
Rhodes v. Iowa, 170 U.S. 412 (1898) .....	37, 46

## TABLE OF AUTHORITIES

CASES	Page
Rice v. ABC Appeals Bd., 21 Cal. 3d 431 (1978) .....	4, 9, 11, 12, 13, 14, 15, 16, 17, 18, 24, 25, 26, 29, 57, 65
Rice v. ABC Appeals Bd., 137 Cal. Rptr. 213 (1977) .....	10
Sail'er Inn, Inc. v. Kirby, Director of ABC, 5 Cal. 3d 1 (1971) .....	43, 44
Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951) .....	7, 28, 62, 67
Slater v. Blackwood, 15 Cal. 3d 791 (1975) .....	27
Southern Pac. Transp. Co. v. PUC, 18 Cal. 3d 308 (1976) .....	14
State Bd. of Equalization v. Young's Market, 299 U.S. 59 (1936) .....	52
Tacon v. Arizona, 410 U.S. 351 (1973) .....	33
Taub v. Bowles, 149 F.2d 817 (Emer. Ct. App.), cert. denied, 326 U.S. 732 (1945) .....	60
United States v. Erie County Malt Beverage Distrib. Ass'n, 264 F.2d 731 (3d Cir. 1959) .....	56
United States v. Frankfort Distilleries, 324 U.S. 293 (1945) .....	53, 55, 56, 57
United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) .....	28
United States v. South-eastern Underwriters Ass'n, 322 U.S. 533 (1944) .....	67
United States v. Tax Comm'n of Miss., 412 U.S. 363 (1973) .....	43
United States v. Topco Assoc., 405 U.S. 596 (1972) .....	70
Walker v. Munro, 178 Cal. App. 2d 67 (1960) .....	5
William Jameson & Co. v. Morgenthau, 307 U.S. 171 (1939) ..	51

## Constitutions

United States Constitution	
Commerce Clause (art. I, § 8, cl. 3) .....	passim
Supremacy Clause (art. VI, cl. 2) .....	27, 37, 38, 41, 52
Eighteenth Amendment .....	47, 49
Twenty-first Amendment .....	passim
California Constitution	
Article III, § 3.5 .....	5, 6, 14, 15
Article V, § 1 .....	5
Article V, § 13 .....	5
Article XX, § 22 .....	4, 5

## Statutes

Sherman Act	Page
(15 U.S.C. § 1 et seq.) .....	passim
Federal Trade Commission Act	
(15 U.S.C. § 41 et seq.) .....	8, 29
Wilson Act	
(27 U.S.C. § 121) .....	22, 33, 34, 35, 36, 37, 38, 40, 42, 44, 50
Webb-Kenyon Act	
(27 U.S.C. § 122) .....	22, 33, 34, 37, 38, 39, 40, 42, 44, 45, 46, 50
Federal Alcohol Administration Act	
(27 U.S.C. § 201 et seq.) .....	50, 51
Miller-Tydings Act	
50 Stat. 693 (1937) .....	8, 20, 30, 31, 62, 63
McGuire Act	
66 Stat. 632 (1952) .....	8, 20, 29, 31, 63
Consumer Goods Pricing Act of 1975	
Pub. L. No. 94-145	
89 Stat. 801 (1975) .....	8, 10, 29, 63
California Business & Professions Code	
§ 16900-05 .....	3
§ 17040 .....	70
§ 17043 .....	70
§ 17044 .....	70
§ 24755 .....	3
§ 24862 et seq. ....	3, 16
§ 24866 .....	3, 16
California Food & Agriculture Code	
§ 61582 .....	7
1931 Cal. Stats. ch. 278 .....	7
1949 Cal. Stats. ch. 574 .....	3
1968 Cal. Stats. ch. 205 .....	3
1975 Cal. Stats. ch. 402 .....	7
1977 Cal. Stats. ch. 1192 .....	7
1978 Cal. Stats. ch. 359 .....	14
1979 Cal. Stats. ch. 455 .....	14, 58

## Regulations

4 California Administrative Code	
§ 99 (repealed) .....	12
§ 101 .....	3

Rules	Page
Supreme Court Rule 23.1(c) .....	33
<b>Congressional Reports</b>	
S. Rep. No. 1330, 74th Cong., 1st Sess. (1935) .....	39
S. Rep. No. 94-466, 94th Cong., 1st Sess. (1975) .....	29, 30, 31, 32
H.R. Rep. No. 1542, 74th Cong., 1st Sess. (1935) .....	51
H.R. Rep. No. 94-341, 94th Cong., 1st Sess. (1975) .....	29, 30, 31
<b>Hearings</b>	
A Bill to Repeal the Fair Trade Laws: Hearings on S. 408 Before the Subcom. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess. (1975) .....	32
In re Informational Hearing on Price De-regulation (N.J. Dept. of Law & Pub. Safety) (February 9, 1979) .....	11, 12, 13, 68
<b>Congressional Record</b>	
Vol. 21 (Senate Debate on Wilson Act) .....	35, 36
Vol. 49 (Senate Debate on Webb-Kenyon Act) .....	37, 38
Vol. 76 (Senate Debate on Twenty-first Amendment) .....	45, 46, 47, 48, 49, 53
Vol. 79 (House Debate on Federal Alcohol Administration Act) .....	52
Vol. 79 (Senate Debate on Reenactment of Webb-Kenyon Act) .....	39
<b>Miscellaneous Reports</b>	
Moreland Commission Study Paper No. 5, Resale Price Maintenance in the Liquor Industry (1963) .....	9
Moreland Commission Report and Recommendation No. 3, Mandatory Resale Price Maintenance (1964) .....	9
Report of Senate Select Committee on Laws Relating to Alcoholic Beverages (1974) .....	8, 14
<b>Texts</b>	
P. Areeda & D. Turner, Antitrust Law (1978) .....	62, 64, 65

Law Reviews	Page
Engman, The Case For Repealing "Fair Trade," 7 Antitrust Law & Econ. Rev. 79 (1975) .....	7
Posner, The Proper Relationship Between State Regulation and the Federal Antitrust Laws, 49 N.Y.U. L. Rev. 693 (1974) ..	66
Handler, Twenty-fourth Annual Antitrust Review, 72 Colum. L. Rev. 1 (1972) .....	65
Carr, Liquor and the Constitution, 7 Law & Contemp. Prob., 709 (1940) .....	44
Comment, Spirits and the Sherman Act, 12 U.C.D. L. Rev. 176 (1979) .....	17
Note, Retail Price Maintenance for Liquor: Does the Twenty-first Amendment Preclude a Free Trade Market?, 5 Hastings Con. L. Q. 507 (1978) .....	44
The Supreme Court, 1975 Term, 90 Harv. L. Rev. 56 (1976) ..	64
Comment, The Concept of State Power Under the Twenty-first Amendment, 40 Tenn. L. Rev. 465 (1973) .....	44, 49
Note, The Twenty-first Amendment Versus the Interstate Commerce Clause, 55 Yale L. J. 815 (1946) .....	44
Comment, 25 Calif. L. Rev. 718 (1937) .....	44
<b>Miscellaneous</b>	
State Gives in on Liquor Pricing, L.A. Times, July 1, 1978 ....	13



# In the Supreme Court

OF THE

United States

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OCTOBER TERM, 1979

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**No. 79-97**

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CALIFORNIA RETAIL LIQUOR DEALERS ASSOCIATION,  
*Petitioner*

v.

MIDCAL ALUMINUM, INC.,  
*Respondent*

BAXTER RICE as Director of the  
Department of Alcoholic Beverage Control  
of the State of California,  
*Respondent*

---

**On Writ of Certiorari to the Court of Appeal of the  
State of California, Third Appellate District**

---

**BRIEF FOR RESPONDENT  
MIDCAL ALUMINUM, INC.**

---

## **QUESTION PRESENTED**

Under the Twenty-first Amendment or the state action doctrine, may a state compel private parties to fix prices for wine in direct violation of federal antitrust law, where the state exercises no control over those prices?

## STATEMENT

In accord with a national pattern, California in the last five years repeatedly has turned away from "fair trade" concepts spawned in the Depression and has returned to a commitment to open price competition. Vestiges of resale price maintenance ("RPM") have lingered in the alcoholic beverage industry. However, in the last few years the responsible state governmental entities have rejected fair trade even in this industry. These entities have acted out of a developing understanding that alcoholic beverage fair trade does not serve the state's interests or the purposes attributed to it, conflicts with fundamental antitrust principles, and directly and significantly harms consumers.

This case, which comes to the Court from a state intermediate appellate court, concerns in particular wine RPM, as distinguished from other alcoholic beverages or from other commercial articles. However, the case comes on the heels of a series of decisions by state entities on alcoholic beverage fair trade in general—decisions that put this case in its full context. Although it has chosen not to defend RPM or even to appear in this Court, the state alcoholic beverage control agency is, for all practical purposes, the real party in interest. This agency administers the alcoholic beverage RPM provisions, and it is the decisions of this agency that petitioner would commit to the dictates of this Court. Yet, as will appear, this agency, the key agency under state law, no longer wants RPM. The exponents for a belated revival of RPM before this Court are a group of retailers who seek to be excused from the price competition otherwise commanded by the Sherman Act.

## THE STATE STATUTES, GOVERNMENTAL ENTITIES, AND PARTIES INVOLVED

### A. State Statutes

Alcoholic beverage RPM in California falls under statutes separate from the former general fair trade statutes. Compare Cal. Bus. & Prof. Code § 24755 (distilled spirits) and *id.*, § 24862 *et seq.* (wine), with *id.*, §§ 16900-05 (commodities) (repealed). The wine statutes, enacted in 1949, achieved their current form in 1968. 1949 Cal. Stats. ch. 574; 1968 Cal. Stats. ch. 205. Although the wine provisions appear in distinct statutory sections, the wine RPM system is similar in many respects to general fair trade systems formerly in effect in California and in other states, before the recent wave of repeals of such statutes.

The state statutes directly at issue, Cal. Bus. & Prof. Code §§ 24862 and 24866, appear at pp. 10-12 of the appendix to petitioner's opening brief.<sup>1</sup> The statutes deal with pricing activities at all three steps in the vertical distribution ladder—producers, wholesalers, and retailers. Under these statutes, as a condition of selling wine intended for off-premises consumption, producers (or, in certain cases, their designees) are compelled to fix the prices at which wholesalers sell to retailers and the minimum prices at which retailers may sell to consumers. This is accomplished through a combination of widely-publicized price schedules and "fair trade" contracts between entities in the chain of distribution.

The prices fixed under fair trade for wine in California are, with unimportant exceptions, rigid; they cannot be reduced in quick response to changing marketing condi-

<sup>1</sup>Corresponding regulations appear at 4 Cal. Admin. Code § 101, portions of which are set forth at pp. 7-9 of the appendix to petitioner's opening brief. See also pp. 451-56 of the record lodged with this Court (hereinafter cited as "R.").

tions. Moreover, in addition to making sales and resales illegal except at fixed prices, the RPM provisions explicitly make it illegal for retailers to buy wine except at fixed prices.

The state exercises no control over or review of the prices fixed pursuant to alcoholic beverage fair trade.<sup>2</sup> Subject to below-cost pricing prohibitions not pertinent here, the levels of those prices are determined solely by private parties. The only role of the state is to punish those who deviate from the fixed prices.

Wine is essentially a domestic industry in California; wine sales in the state "are basically of California produced wine."<sup>3</sup> Accordingly, the principal application of the statutes is to domestic wine, and the terms of the statutes indicate that their purposes do not include curbing imports.

Under the wine RPM provisions, the posting of any retail price above cost is permitted. Thus, the provisions do not prevent the setting of wine prices at very low prices by importers or domestic producers, and an importer is free to flood the California market with cheap wine.

#### B. State Governmental Entities

The state constitution lodges exclusive power to administer California's alcoholic beverage statutes, including those at issue in this case, in the state Department of Alcoholic Beverage Control ("ABC"). Cal. Const. art. XX, § 22.

<sup>2</sup>See *Rice v. ABC Appeals Bd.*, Pet. App. C at 10-11. Citations to the *Rice* case, also known as the *Corsetti* decision in reference to the alcoholic beverage licensees involved, are to the pages in Appendix C to the petition for certiorari, where the *Corsetti* opinion is reproduced. *Corsetti* is reported at 21 Cal. 3d 431 (1978).

<sup>3</sup>Joint Appendix (hereinafter cited as "Jt. App.") 40; R. 120.

The Director of the ABC, nominally a respondent herein, is appointed by "and shall serve at the pleasure of the Governor." *Ibid.*<sup>4</sup> The state constitution further provides:

The director may be removed from office by the Governor, and the Legislature shall have the power, by a majority vote of all members elected to each house, to remove the director from office for dereliction of duty or corruption or incompetency. *Ibid.*

The Director heads the ABC. *Ibid.* The California Constitution also makes the governor the supreme executive officer of the state. *Id.*, art. V, § 1. Accordingly, pursuant to state constitutional law, the governor is the highest officer with executive power over the state's alcoholic beverage laws, directly and through his deputy, the Director of the ABC, whom he can discharge at will and totally within his discretion.<sup>5</sup>

The state constitution also creates the ABC Appeals Board. *Id.*, art. XX, § 22. The Board reviews the actions of the ABC, including whether, *inter alia*, the ABC "has proceeded in the manner required by law. . . ." *Ibid.* Before June 6, 1978, the review power of the Board included passing on the validity of statutes within its purview. *E.g.*, *Walker v. Munro*, 178 Cal. App. 2d 67 (1960). However, in June, 1978, the California electorate amended the state constitution by approving a ballot measure known as Proposition 5. Proposition 5, now Cal. Const. art. III, § 3.5, bars state agencies from declaring statutes unconstitutional and from refusing to enforce statutes on grounds of uncon-

<sup>4</sup>The Director's appointment is subject to confirmation by a majority vote of all members of the state Senate. *Ibid.*

<sup>5</sup>The State Attorney General ("AG") has no enforcement authority with regard to those statutes; the state constitution conveys enforcement powers exclusively to the ABC. *Id.*, art. XX, § 22. Furthermore, the AG's general law enforcement duties are expressly "subject to the powers and duties of the Governor. . . ." *Id.*, art. V, § 13.



stitutionality or conflict with federal law unless an appellate court previously has made such a determination.<sup>6</sup> The Board has held that Proposition 5 deprives it of authority to declare statutes invalid.<sup>7</sup>

In sum, the state legislature in California enacts state alcoholic beverage law, including fair trade. However, the state constitution also devolves considerable power over the field to the Director of the ABC, to the ABC Appeals Board, and to the governor. In addition, the state constitution gives the legislature direct authority to remove the Director at any time for "dereliction of duty." This means that the legislature has a ready check on the Director if it determines that the Director's policies are in frustration of its will.

### C. Parties

At its origin, the parties to this case were the ABC and Midcal Aluminum, Inc. After the decision of the court below, the ABC ceased any defense of the RPM provisions. The remaining parties are Midcal, respondent herein, and the California Retail Liquor Dealers Association

<sup>6</sup>Art. III, § 3.5 reads as follows:

An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:

(a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;

(b) To declare a statute unconstitutional;

(c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

<sup>7</sup>*In re Ferrigno*, AB-4637 (1979), Pet. App. E at 8; *In re Capiscean Corp.*, AB-4490 (1978). The Board ruling in *Capiscean* appears at R. 463-70. It also appears as Appendix D to the Memorandum in Opposition to Motion of State Attorney General, etc., filed earlier in this Court by respondent. The appendices to that Memorandum are cited hereinafter as "Memo. App."

(CRLDA), an intervenor below and petitioner in this Court.

Midcal is a licensed wholesaler (or "distributor") of wine and distilled spirits. It sells alcoholic beverages to licensed retailers for resale to consumers in Los Angeles and Orange Counties, California.<sup>8</sup>

CRLDA is a trade association, which claims membership of approximately 3,000 retailers. Jt. App. 39. There are approximately 24,000 off-sale retail licenses for wine in the state. R. 180. Approximately two-thirds of the CRLDA members are located in southern California, in the marketing area of Midcal. Jt. App. 39.

## II

### THE SERIES OF DECISIONS BY STATE GOVERNMENTAL ENTITIES LEADING UP TO THE DECISION BELOW

#### A. Background

California enacted fair trade for general articles of commerce in 1931, becoming the first state in the Union to attempt through authorized price fixing to reverse the collapse of prices brought about by the Great Depression. See *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 390 (1951); 1931 Cal. Stats. ch. 278; Engman, *The Case for Repealing "Fair Trade,"* 7 Antitrust Law & Econ. Rev. 79, 80 (1975). As part of a national trend, the state repealed its general fair trade statute in 1975. 1975 Cal. Stats. ch. 402.<sup>9</sup> This was roughly simultaneous

<sup>8</sup>Jt. App. 4; R. 39.

<sup>9</sup>In 1977, California also repealed its statutes authorizing the Director of Food and Agriculture to establish minimum wholesale and retail milk prices. 1977 Cal. Stats. ch. 1192. The legislation repealing the former provisions included a statute permitting the Director to establish temporary minimum prices after public hearing and a finding that certain conditions exist. See Cal. Food & Ag. Code § 61582. The degree of state involvement in the setting of the levels of milk prices in California, either before or after the recent statutory change, does not exist for wine.

with Congress' repeal of the McGuire and Miller-Tydings Acts, the former federal fair trade exemptions from the price fixing prohibitions of § 1 of the Sherman Act and § 5 of the Federal Trade Commission Act. Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 (1975).

#### B. Recommendations for Ending Alcoholic Beverage RPM

The state Senate Select Committee on Laws Relating to Alcoholic Beverages indicted California alcoholic beverage fair trade in its final report in August, 1974 (hereinafter "Select Report"). The Select Committee noted that California "is rather unusual because it is one of the few states that has maintained a policy of Resale Price Maintenance in its regulation of the alcoholic beverage industry." Select Report 81. The Select Committee found the results of this "unusual" policy to be unacceptable. It led to artificially maintained consumer prices, "about the highest" in the nation, although California levies "one of the lowest excise taxes" in the country. *Id.*, 6, 9, 82. Alcoholic beverage RPM "... has resulted in the elimination of any semblance of competition within the industry." *Id.*, 9. The Select Committee found no connection between fair trade and temperance, allegedly one of fair trade's principal goals. The Committee concluded that alcoholic beverage RPM represented:

... an industry policy of charging what the consuming public will pay. It does not appear to have anything to do with "promoting temperance."

*Id.*, 82.

The conclusions of the Select Committee corroborate those of the New York State Moreland Commission on the Alcoholic Beverage Control Law, the well-respected commission whose work has been cited by the California Su-

preme Court and by this Court.<sup>10</sup> The Moreland Commission rejected compulsory RPM as "at war with the American system of free competition." Moreland Report 10. It found that RPM produced dramatically higher consumer prices than open price competition, *id.*, 3-8, yet "the assumed relationship between the system of mandatory resale price maintenance and the goal of temperance is non-existent." *Id.*, 14.<sup>11</sup> The Commission concluded that liquor RPM stifled competition and encouraged economic waste and inefficiency. *Id.*, 1. Its comprehensive review of the subject prompted the Commission to:

... reject the proposition that state-enforced price decisions so important to the community at large

<sup>10</sup>See Report and Recommendations No. 3, Mandatory Resale Price Maintenance (1964), hereinafter cited as the Moreland Report. The Moreland Report was cited by the California Supreme Court in *Rice v. ABC Appeals Bd.*, Pet. App. C at 37. The Moreland Report was in the record before this Court in *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 39 n.8 (1966). The Court pointed out that the Report:

... found unequivocally that compulsory resale price maintenance had had "no significant effect upon the consumption of alcoholic beverages, upon temperance or upon the incidence of social problems related to alcohol." It also found that New York liquor consumers had been the victims of serious discrimination because of the higher prices and reduced competition fostered by the mandatory minimum price maintenance provision of the law. The Commission therefore recommended the repeal of that provision. (footnotes omitted). *Id.*, 39.

<sup>11</sup>As a major reason for recommending the end of alcoholic beverage RPM, the Commission stated:

Neither temperance nor respect for law is promoted by the artificially maintained high prices that sacrifice the interest of the consumer to the benefit of the liquor industry.

*Id.*, 1. In a preliminary paper leading up to its Report, the Commission noted that the "main beneficiaries" of alcoholic beverage RPM appear to be retailers, the "main victims," consumers. Furthermore, if prices must remain high, "the State has ample power to keep them high without delegating price fixing power to private individuals and without committing itself to police their decisions." Moreland Commission Study Paper No. 5, Resale Price Maintenance in the Liquor Industry (1963).



should be turned over to a small private group with such a large direct financial self-interest.

*Id.*, 2.

### C. The Corsetti Decision

#### 1. THE ABC APPEALS BOARD

As noted above, the state constitution creates the ABC Appeals Board as an administrative tribunal to review actions of the ABC. In 1976, the Appeals Board threw out RPM for distilled spirits in California, finding no rational relationship between the goals of the ABC Act (promotion of orderly marketing conditions and temperance)<sup>12</sup> and the RPM statutes. *In re Corsetti*, AB-4311, Memo. App. A at 16, 17, 19-23.

The Board concluded that the Sherman Act, as amended by the Consumer Goods Pricing Act of 1975, invalidated alcoholic beverage RPM, because RPM prompted *per se* illegal price fixing. *Id.*, 9-19. The Board ruled that the Twenty-first Amendment did not save RPM; that Amendment does not repeal the Commerce Clause (from which the Sherman Act derives), and the state played no role in the actual determination of prices. *Id.*, 11-19. Because there is no rational relationship between the ends of temperance and orderly marketing conditions and the means employed to achieve them (the RPM system), the Board also based its decision on state and federal equal protection grounds. *Id.*, 19-23.

#### 2. THE CALIFORNIA SUPREME COURT

An intermediate appellate court rejected the Appeals Board decision in *Corsetti*. *Rice v. ABC Appeals Bd.*, 137 Cal. Rptr. 213 (1977), *vacated*, May 16, 1977. On May 30,

<sup>12</sup>See *Allied Properties v. ABC*, 53 Cal. 2d 141, 150 (1959) ("... [T]he primary purpose of the fair trade provisions of the Alcoholic Beverage Control Act is to promote orderly marketing conditions and temperance.")

1978, the California Supreme Court reversed the lower court and reinstated the Appeals Board's invalidation of alcoholic beverage RPM. *Rice v. ABC Appeals Board*, Pet. App. C. Like the Board, the highest state court declared that: RPM led to price fixing and eliminated any semblance of competition; California consumers paid about the highest prices in the country; temperance was not promoted; and small retailers were not protected. *Id.*, 31, 33, 36, 37. The court concluded that the price fixing prompted by RPM collided with the Sherman Act and that there were alternative means to accomplish the state's ends without conflict with federal law. *Id.*, 38. Because the provisions of the federal constitution must be read as an integral whole, the Twenty-first Amendment is not dispositive; under the circumstances, state interests are outweighed by conflicting federal interests under the Commerce Clause. *Id.*, 21-39. And, because the state made no effort to regulate RPM prices but left them wholly to the discretion of private entities, RPM was not saved by the state action doctrine. *Id.*, 18.

### D. Post-Corsetti Decisions by State Governmental Entities

Neither the state governor nor the state AG sought review of the California Supreme Court decision in the *Corsetti* matter. Significantly, the ABC, the state agency with exclusive jurisdiction over alcoholic beverage RPM, also elected not to seek review. The Director of the ABC explained this decision in recent hearings before state authorities in New Jersey:

... [O]n May the 30th, [1978], when the decision [by the California Supreme Court in *Corsetti*] came down, there was tremendous pressure placed on me to take that case on into the Federal Courts. I saw no reason to do so, since I'm a state administrative agency, and my own State Supreme Court told me that the, that the [*sic*] law was violative of the Sherman Anti-trust



Act, it was violative of certain state statutes, and, therefore, we waited for the 30 day period, we asked for reconsideration [by the California Supreme Court] during the 30 day period, and at the end of the 30 days when the [state] Court decided not to rehear or reconsider, we let the matter drop.<sup>13</sup>

In the course of his testimony, the Director also detailed the after-effects of the *Corsetti* decision in California. He pointed out that since *Corsetti* the ABC has "conducted extensive surveys within the industry in California at all levels . . .," and "we have not one shred of evidence that one retailer has gone out of business as a result of the invalidation of fair trade." Memo. App. B at 3.<sup>14</sup> He pointed out

<sup>13</sup>Testimony of Baxter Rice, Director of the California ABC, before the New Jersey Department of Law & Public Safety, Division of Alcoholic Beverages Control, In re Informational Hearing on Price De-Regulation etc., Memo. App. B at 15 (February 9, 1979).

One of the entities that pressured Mr. Rice to seek certiorari in *Corsetti* was CRLDA, petitioner herein. Despite the request, Mr. Rice declined to seek further review. Jt. App. 44 ¶ 13.

After *Corsetti* became final in the state, the ABC repealed regulations governing retail RPM for distilled spirits. See 4 Cal. Admin. Code § 99 (repealed).

<sup>14</sup>Nor did the ABC find any indication that *Corsetti* had impeded the marketing of liquor licenses. *Id.*, 31. In his testimony, the Director also pointed out that the demise of RPM had not produced chaotic conditions in the alcoholic beverage industry in California:

Let me initially say that prior to June of 1977, and during the last seven months, there were great prophets of doom and gloom for the demise of the independent retailer and for chaotic conditions in California. During the past seven months, we have conducted extensive surveys within the industry in California at all levels. We have discussed marketing practices and various marketing techniques of all the facets of the alcoholic beverage industries, and we've been unable to substantiate the prophecies of despair.

On the contrary, the last two quarters in California have been red letter months. That is not to say that the invalidation of fair trade in California has not forced a re-evaluation of marketing practices and techniques, nor is it to say that there may not be a reduction of inefficient or non-innovative retailers,

that "the administration" in California opposed post-*Corsetti* bills in the state legislature to resurrect liquor fair trade. *Id.*, 6. The ABC Director also noted his personal opposition to fair trade, asking rhetorically "what purpose does the price posting serve other than the state acting as [the wholesalers'] industrial espionage agent." *Id.*, 18-19. He further referred to RPM as a "euphemism" for "profit guaranty." *Id.*, 5.

The Director's decision to abide by the state court decision in *Corsetti* was well publicized at the time, e.g., *State Gives In On Liquor Pricing*, L.A. Times, July 1, 1978, Part 1, 21, yet it did not lead to his removal from office by the governor, pursuant to that officer's absolutely discretionary removal power. Nor did the state legislature attempt to remove the Director on grounds of dereliction of duty. To the contrary, the post-*Corsetti* actions of the legislature and the governor are in accord with the policy course set by the Director—not to defend RPM, not to seek its reinstatement, and to enforce its vestiges only until invalidation occurs in the state courts. See Memo. App. B at 19: "I'm willing to take the case in court."

but let me say this, that we have in California approximately 56,000 retailers, and we have not one shred of evidence that one retailer has gone out of business as a result of the invalidation of fair trade. Let me also emphasize that on an annual basis, we have approximately 18,000 licensed transactions, and that figure has not varied since the abolition of fair trade, either up or down, and that the reasons for people going in or out of business are the same today as they were a year ago. People are in this business at the manufacturing level, at the wholesale level, and at the retail level to make money. If they are not making money, then they should not be in the business. It's very simple. It's a very basic and fundamental principle of the free enterprise system.

*Id.*, 3-4. ABC officials further pointed out in the New Jersey hearings that the invalidation of fair trade in California prompted immediate and sharp drops in retail prices, although industry cost increases have subsequently tempered this effect of free price competition. *Id.*, 21-22.

Shortly after the California Supreme Court decision in the *Corsetti* matter, the state legislature eliminated funding for RPM enforcement for distilled spirits. 1978 Cal. Stats. ch. 359, § 2, item 132, p. 29. After *Corsetti*, the legislature also rejected A.B. 935, an attempt, opposed by the ABC, to revive fair trade in the form of a minimum price markup for distilled spirits at the retail level. Memo. App. C; Memo. App. B at 6. On the other hand, the legislature passed a bill allowing retailers to pool their purchases of distilled spirits, in order to qualify for volume discounts. 1979 Cal. Stats. ch. 455. Cooperative buying of this kind was recommended by the Select Committee in 1974 as a step to be undertaken following the repeal of alcoholic beverage RPM. Select Report 84-85.

Given *Corsetti*, the decisions of the pertinent state entities not to seek reversal of that decision, the antipathy of the ABC and the ABC Appeals Board to alcoholic beverage RPM, the evident indifference of the legislature to revival of RPM, and the practical equivalence between the distilled spirits and wine RPM provisions in California, the wine RPM statutes came before the courts largely because of an intervening, unrelated event—Proposition 5. As noted above, Proposition 5 bars state administrative agencies from refusing to enforce state laws on grounds of federal or state unconstitutionality or conflict with federal statutes or regulations until those laws are invalidated by appellate courts. Proposition 5 was on the ballot before the California Supreme Court decision in the *Corsetti* matter. Its roots apparently lie in rulings by state public utilities agencies; it seems to have had nothing to do with *Corsetti*. See, e.g., *Southern Pac. Transp. Co. v. PUC*, 18 Cal. 3d 308 (1976). Coincidentally, Proposition 5 became law in the state within a matter of days after the California Supreme Court decision in *Corsetti*.

After *Corsetti* and Proposition 5, the ABC Appeals Board issued a ruling declaring its view that the wine RPM provisions were invalid but also declaring that Proposition 5 forbade it from invalidating them. *In re Capiscean Corp.*, *supra*, n.7 (July 20, 1978). The ABC dropped its enforcement of distilled spirits RPM but took the position, as a formal matter and because of Proposition 5, that the analogous RPM statutes for wine were to be honored until the courts struck them down. Jt. App. 12-15. Thereafter, the *Capiscean* matter (which commenced before the California Supreme Court decision in *Corsetti*) proceeded to an intermediate appellate court, as noted below, and the ABC brought the instant prosecution, apparently as a test case to deal with the wholesale RPM provisions for wine. See Memo. App. B at 18.

In the state appellate court proceedings in *Capiscean* and the instant case, the ABC did not mount a vigorous defense of wine RPM, as will appear more fully below. Indeed, it is no overstatement to remark that the ABC did not really defend RPM at all; obviously the agency does not want it.<sup>15</sup> It has suggested the invalidity of wine RPM, at least at the

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<sup>15</sup>The state AG appears to be the only high level state official actively striving to reinstate wine RPM. Before his election to office, the current AG was a member of the state legislature, where he supported alcoholic beverage RPM. See, e.g., S.B. 1435 (1978) (co-sponsored by state senator Deukmejian) (Bill to grant Director of ABC power to enjoin RPM and other ABC Act violations), defeated in state legislature. As noted in text below, in post-*Corsetti* state proceedings against wine RPM, while representing the ABC, the AG has—on behalf of his then client—not presented an active defense for RPM. The AG has concurred in decisions not to seek review of state court decisions invalidating RPM. Now the AG attempts to defend wine RPM in *amicus* submissions to this Court. However, the ABC (which does not seek reversal here) has balked, and the AG has been compelled to inform this Court by letter of a “conflict of interest” with the ABC requiring the AG formally to withdraw any claim of representing the ABC before this Court. Letter to Honorable Michael Rodak, Jr. (November 29, 1979).



retail (consumer) level, to the state courts. R. 151, 166, 173. It (and the AG) have declined to seek review of state court decisions invalidating RPM. It has withdrawn from enforcement of retail RPM altogether in the last 18 months, although widespread retail price competition for wine is a matter of common knowledge in California. All of these ABC decisions in the last 18 months are of public record in the industry and in state government. Yet no effort has been made by the governor or the legislature, both of whom have ready removal powers, to deflect or alter the Proposition 5 based policy adopted by the ABC Director—not to defend wine RPM, and to cease enforcement if RPM is declared invalid by the state courts.

#### E. The Capiscean Decision

On January 2, 1979, the state Court of Appeal for the First Appellate District issued its ruling and opinion in *Capiscean Corp. v. ABC Appeals Bd. and ABC* (as real party in interest), 87 Cal. App. 3d 996, Pet. App. D. The *Capiscean* court "consider[ed] the validity of fair trade laws regulating the sale of wine in this state, in light of the ruling in" *Corsetti*. (emphasis added). Pet. App. D at 1. The court could discern no significant differences between the statutes invalidated in *Corsetti* and the wine RPM provisions, noting that "the impact of the restrictions is identical." *Id.*, 4. It referred specifically to and quoted Cal. Bus. & Prof. Code §§ 24862 and 24866, the precise wine RPM provisions at issue in the instant case. *Id.*, 3, 4. In light of the *Corsetti* (or *Rice*) decision, the court stated:

We conclude that the wine price maintenance provisions cannot be distinguished from the price maintenance provisions invalidated in *Rice* and, for the reasons stated in *Rice*, must also fall. (emphasis added).

*Id.*, 4.

The ABC did not seek review of the *Capiscean* ruling. Nor did the AG or anyone else. The ruling and judgment

of the court became final. Technically speaking, the judgment in *Capiscean* may reach only wine RPM at the retail (consumer) level; the accused in the case was a retailer prosecuted only for selling below fixed minimum retail prices. However, the court's opinion declares that wine RPM in California is invalid at both the wholesale and retail levels, and the court's ruling has been so interpreted. Comment, *Spirits and the Sherman Act*, 12 U.C.D. L. Rev. 176, 187 n.57 (1979).

### III

#### THE PROCEEDINGS BELOW

This case commenced on August 15, 1978, with an ABC accusation against respondent Midcal for selling wine at other than posted prices. Jt. App. 16-18. The accusation issued before the *Capiscean* intermediate appellate court ruling. Midcal stipulated to the accusations of fact, and the case proceeded directly into state appellate court on a mandamus petition by Midcal seeking a determination of the invalidity of wholesale and retail wine RPM. Jt. App. 3-20.<sup>16</sup> CRLDA was permitted to intervene. R. 196.

The state AG appeared on behalf of the ABC, R. 61, referred to the ABC as "my client, respondent Department

<sup>16</sup>Although a wholesaler, Midcal was forced to challenge the validity of wine RPM at the retail as well as the wholesale level, for two reasons. First, retail and wholesale RPM are inextricably intertwined in the wine provisions. Second, Midcal was accused, in part, of selling to retailers a new product which had never been posted. Jt. App. 17. This new product was released shortly after the California Supreme Court decision in *Corsetti* and, indicative of the practical effects of that ruling in the state, no postings were ever made for it. As noted above, the wine RPM provisions forbid retailers from either buying or selling unposted products. One of Midcal's major customers refused to take the new product until the invalidity of the wine RPM provisions was established, and Midcal feared that other retailers would take the same position. R. 51-54. This impaired Midcal's ability to market its products and compelled it to challenge the retail as well as the wholesale RPM aspects of the wine provisions. *Ibid.*



of Alcoholic Beverage Control. . . ,” R. 200, and notified the court that it was necessary for the AG “to consult with the respondent Director of the Department of Alcoholic Beverage Control and others so that policy considerations may be developed and determined . . . .” R. 57.

Thereafter the AG submitted a brief for the ABC repeatedly suggesting that at least the retail level price maintenance aspects of the wine provisions were invalid and advancing essentially none of the points the AG, in his proclaimed “*amicus*” role, is now pressing in this Court, after withdrawing as counsel for ABC. R. 147-177.

Only CRLDA actively espoused the maintenance of wine RPM in the proceedings below. As a major ground for its intervention motion, CRLDA cited the ABC’s lack of interest in upholding or promoting fair trade. Jt. App. 27 ¶ VI, 37, 44 ¶ 13. In these sections of its complaint in intervention, supporting memorandum, and declaration, CRLDA informed the court below that the ABC was not interested in RPM enforcement, was a reluctant litigant, had not withdrawn totally from wine RPM enforcement solely because of Proposition 5, and had rejected CRLDA requests to seek certiorari in *Corsetti*. *Ibid*.

Consistent with *Capiscean* and *Corsetti*, the court below invalidated wine RPM. *Midcal Aluminum, Inc. v. Rice, Director of ABC*, 90 Cal. App. 3d 979 (1979), Pet. App. A. Neither the ABC nor the AG sought further review. Only CRLDA petitioned the highest state court, R. 380, which denied review. Pet. App. B. Neither the ABC nor the AG sought review in this Court. This Court granted CRLDA’s petition for certiorari on October 1, 1979.

## SUMMARY OF ARGUMENT

Viewed realistically, the arguments raised in support of reversal in this case represent a belated collateral attack on state court decisions, not before this Court, of a year and a year and a half ago. Moreover, the state officers with administrative authority over the statutes at issue do not seek reversal and do not endorse alcoholic beverage RPM. The Court has been benefitted by the views of the state AG (views in conflict with those espoused below and with previous decisions of the AG not to attempt to stem the demise of alcoholic beverage RPM), but that officer does not speak for the state on the subject matters raised. The real exponents of reversal are a group of retailers who would prefer not to have to engage in price competition.

The retailers pitch their case on federalism concepts, as reflected in the Twenty-first Amendment on the one hand and the state action doctrine on the other. They have chosen a particularly awkward vehicle for presenting these issues. The wine price fixing statutes at issue have no significant relationship to the practical problems of **dry states** which the Twenty-first Amendment was designed to solve, the state has no voice regarding the levels of prices that are fixed, and, as shown by the events of the last several years, the state has indicated anything but a vital interest in preserving the price fixing system at issue. Because of a series of decisions over the last three years by *state* governmental entities finding no significant state interests served by alcoholic beverage RPM, the state has largely adapted to the competitive principles of the Sherman Act—with no trace of the catastrophic consequences asserted by petitioner. It would be disruptive, if not impractical, to attempt to reverse that course at this late date and to reimpose RPM on state officers who do not want it. It would be most remarkable for this Court to do so by, as petitioner seeks, giving little or no consideration to the strong federal interests embodied in the Sherman Act.

Wine RPM in California constitutes price fixing in contravention of the antitrust laws. The governing rulings of this Court, coupled with the 1975 repeal of the federal exemption for fair trade, make this evident. Petitioner attempts to rely on passages from congressional reports on the 1975 federal repeal of fair trade, but it is clear that Congress carved out no exemption for alcoholic beverages when it revoked the McGuire and Miller-Tydings Acts. The only open question is whether some other exception to the otherwise controlling policies and prohibitions of the antitrust laws permits reversal of the judgment below.

In support of the price fixing regime it seeks to reinstate, petitioner asserts three grounds: (i) two narrowly drawn federal statutes that preceded the Twenty-first Amendment; (ii) the second section of the Twenty-first Amendment, a provision aimed at the peculiarities of ancient Commerce Clause doctrine that, in the 1930's, were thought to impede the ability of those states wishing to remain "dry" in that era to remain dry; and (iii) the state action doctrine, which is plainly designed to cover programs in which the state *itself* actively controls the establishment of prices (and in so doing creates a surrogate guardian for the public interest, in lieu of the beneficent effects of the open price competition otherwise commanded by the antitrust laws). No such state supervision of prices is present here.

Petitioner's reliance on the above three theories is wholly misplaced.

The narrowly focused, federal statutory evolution antedating § 2 of the Twenty-first Amendment merits this Court's attention solely because that history helps to demonstrate that the original and principal mission of § 2 was to assist the states that were "dry" in the 1930's to remain dry, despite the repeal of federal prohibition effected by

§ 1 of the Amendment. The federal statutes cited by petitioner in its opening brief were early efforts, often unsuccessful, to assist dry states in cutting off importation of liquor from "wet" states by mail order and other techniques that, as a practical matter, often escaped local enforcement. The federal statutes were of dubious constitutionality and subject to the shifting contours of Commerce Clause doctrine in that era. Section 2 of the Twenty-first Amendment "constitutionalized" those statutes, to provide firmer protection for the dry states. Apart from that, the statutes have no pertinence to this proceeding. If addressed by this Court on the merits, they do not provide a ground for reversal of the judgment below. Moreover, they cannot properly be treated by this Court as a distinct ground for reversal, for they were not pressed or passed upon below nor included within the questions presented to this Court in the petition for certiorari.

Petitioner espouses the "absolutist" view of § 2 of the Twenty-first Amendment, arguing that the provision totally negates the Commerce Clause. There have been occasional separate opinions by individual Justices adopting absolutist views of the Amendment. However, those views have never commanded a Court and have been rejected in a number of majority opinions. Petitioner's absolutist reading of the Twenty-first Amendment is patently wrong. Under the correct reading, respondent submits, this Court's judgment must be affirmance.

The Twenty-first Amendment did not *pro tanto* repeal the Commerce Clause or the federal antitrust laws enacted thereunder. An accommodation must be reached between the competing constitutional provisions. The accommodation must give appropriate recognition to the relative significance of opposing federal and state interests, as determined by the specifics of particular cases. The only correct accommodation of the constitutional provision, and



respective interests in this case is to recognize the prevalence of federal law. On the federal side, there is a frontal attack on core principles of federal antitrust law, an important body of national law, with no effort by the state to create a surrogate system for protecting federal goals. On the state side, there is an absence of state supervision over the activities at issue, extensive availability of alternatives to the state to promote its purported purposes without running afoul of the antitrust laws, an unwillingness on the part of the authorized state officials to rise to the defense of the price fixing activities, little or no relationship between the state's ends and RPM, and an area of conduct quite remote from the concerns that prompted the Twenty-first Amendment.

The text, background and history of § 2 of the Twenty-first Amendment clearly demonstrate that the provision's central purpose was to permit historically dry states to remain dry, if they chose to do so, despite the repeal of national prohibition. These indicia reveal no intention to revoke the federal antitrust laws for the benefit of the alcoholic beverage industry, and any such result would be wholly incorrect.

The text of § 2 reaches only "*transportation or importation*" of intoxicating liquors "*into any State . . . for delivery or use therein . . . in violation of the laws thereof . . .*" (emphasis added). This is not an "*importation . . . into*" case, and California is not a dry state. The wine industry in California is by great predominance domestic, and the state statutes at issue do not seek prohibition and are not aimed at importation or at "transportation" into the state.

The Wilson and Webb-Kenyon Acts, coupled with Repeal, form the background of the Twenty-first Amendment. The experiences encountered before and after enactment of

those federal statutes illuminate the essentially narrow purpose of § 2, which is fully reflected in its text. The congressional debates on § 2, as well as contemporaneous congressional enactments, confirm again that § 2 does not warrant, much less command, a reversal in this case.

The states indisputably possess extensive power to regulate the alcoholic beverage industry, and the Twenty-first Amendment does temper the full force of the Commerce Clause in this field. Four brief rulings by this Court in liquor importation cases in the late 1930's departed from the text and history of the Amendment and suggested massive inroads on the Commerce Clause even in non-importation matters. However, this Court's subsequent decisions recognize that the Twenty-first Amendment does not undo the remainder of the Constitution, including the Commerce Clause and the exercise of federal regulatory power pursuant thereto over matters of substantial federal concern. Except in cases dealing exclusively and specifically with state efforts to control importation, the early importation cases are not the law.

The Court previously has recognized the full application of the Sherman Act to alcoholic beverages, even where states have comprehensive regulatory systems. It has never held that the federal antitrust laws automatically succumb to the authority of the states over alcoholic beverages, although it has been urged to do so in previous cases. It most certainly has never upheld the kind of unsupervised price fixing espoused by petitioner. In the past, it has bypassed resolution of the square conflict petitioner urges upon it here, by finding no conflict between sovereignties on the facts presented and reserving judgment until such a case clearly arises. If this is the appropriate case for resolving such a conflict, the correct result is to recognize the predominance of the stringent federal ban against price fixing, especially of the kind at issue here.



The state action doctrine, as enunciated in the decisions of this Court, does not save the RPM system in issue. There can be no dispute that Congress intended the Sherman Act to outlaw RPM systems of this nature and thus the state action doctrine does not apply. In any event, the doctrine envisions actual state supervision of the activities for which antitrust exemption is claimed. The fair trade activity in dispute is devoid of state review or control. The state itself does not set the prices that result, does not approve them in advance, and does not engage in any re-examination of them after they have been fixed by private parties. Moreover, vertical price fixing is not necessary to the state's scheme of alcoholic beverage regulation. Numerous alternative means are readily available to the state to promote its ends without conflict with antitrust requirements, and, on balance, the damage to federal interests caused by the RPM system far outweighs any protected state interest.

### ARGUMENT INTRODUCTORY

This case amounts to an attempted collateral attack on the *Corsetti* decision of the California Supreme Court some 18 months after the judgment in that case became final. As the AG states in his *amicus* brief:

Of course, *Rice v. Alcoholic Beverage Control Appeals Board* is long since final. The decision of this Court herein will not directly affect the parties to that case.

AG *Amicus* Br. 36. It equally represents a belated collateral attack on *Capiscean*.

The key party in *Corsetti* was, of course, the ABC. The ABC is bound by that judgment and by the judgment in *Capiscean*. The ABC does not seek reversal in this case. The ABC, the governor, and the AG all decided not to seek this Court's review in *Corsetti*. The Director of the

ABC is on record opposing alcoholic beverage RPM. The ABC Appeals Board has rejected it. The ABC has not actively enforced wine RPM at the retail level since the highest state court decision in *Corsetti*. In addition: (i) the Director of the ABC, on behalf of "the administration," testified in opposition to proposed legislation to reinstate a form of RPM for distilled spirits; (ii) the state legislature rejected the bill opposed by the ABC as well as a bill to give the ABC injunctive powers to enforce RPM; (iii) the legislature eliminated funding for enforcement of distilled spirits RPM; (iv) the ABC withdrew its regulations in that area; (v) the legislature enacted cooperative buying legislation on behalf of retailers, proposed previously by the Senate Select Committee as an ameliorative step to be taken after repeal of fair trade; (vi) the AG and the ABC both elected not to seek further review of the state court decision in *Capiscean* declaring invalid the wholesale and retail wine statutes also at issue in this case; (vii) neither the AG nor the ABC sought highest state court review or this Court's review of the judgment below in this case; and (viii) neither the governor nor the legislature has made any attempt to remove the Director of the ABC from office.

It is evident that the state executive officers empowered by the state constitution to administer the statutes at issue do not desire to see wine RPM continued. The legislature apparently does not see it as a vital issue. The AG, who declined to mount an active defense below and who allowed *Capiscean* to become a final judgment against the ABC, has filed an *amicus* brief in support of CRLDA in this Court, but under state law the AG does not speak for the state on the particular statutes at issue. See n.5, *supra*. The absence of a strong state commitment to RPM constitutes the background against which the two federalism issues raised in this case—the Twenty-first Amendment and the state action doctrine—must be viewed.

The active exponents of fair trade in this case are a subset of the state's distilled spirits and wine retailers, Jt. App. 39-40, 43, seeking to reinstate by indirect means what the Sherman Act bans them from accomplishing directly—a cessation of price competition at the retail level. In the first months after *Corsetti*, they directed their efforts to persuading the ABC to seek certiorari. The ABC declined. Jt. App. 44. During that period, the *Capiscean* matter was in litigation in the state courts; CRLDA made no effort to intervene. Now, belatedly, it seeks to erase the events of the last few years through this case.

At this point, *Corsetti* cannot be undone. Distilled spirits RPM is history in California. Reinstatement of wine RPM, if possible, would not produce the "comprehensive regulatory scheme" referred to in petitioner's brief. Pet. Br. 3. Rather, it would produce a regulatory patchwork, with selective and unfair application reaching only a part of the alcoholic beverage industry. It would unwind the process of adjustment the state has made to the pro-competitive policies of the antitrust laws. Moreover, it would be antithetical to the interests of consumers who, in a period of double-digit inflation, would experience a return to the previous high price levels prompted by RPM.

There is, in any event, a serious question under state law regarding the collateral estoppel effects of the *Capiscean* decision, a judgment which is not before this Court. The ABC litigated the validity of the wine RPM statutes in *Capiscean* and suffered a judgment, which is now final. The ABC confronted a different litigant in this case and the issue is one of law, not fact, but California abandoned the mutuality rule years ago, *Bernhard v. Bank of America*, 19 Cal. 2d 807 (1942), and a number of state court decisions recognize the applicability of collateral estoppel principles

to rulings of law. *E.g.*, *City of Los Angeles v. City of San Fernando*, 14 Cal. 3d 199 (1975); *Hollywood Circle, Inc. v. ABC*, 55 Cal. 2d 728 (1961). The outcome of the issue is not wholly clear; complicated questions of state law abound, the implications of which have not been fully resolved. *E.g.*, *Chern v. Bank of America*, 15 Cal. 3d 866 (1976) (questioning application of collateral estoppel and abrogation of mutuality rule as to questions of law and acknowledging public interest exception in particular circumstances). *But see Slater v. Blackwood*, 15 Cal. 3d 791, 796 (1975) (criticizing general injustice exception to application of res judicata).

These questions raise a risk that the Court may engage in an academic exercise in addressing the validity of the wine RPM statutes. Moreover, the state law collateral estoppel questions raised are not for this Court to resolve. They should be addressed in state court proceedings.

Respondent does not deny the importance of achieving an appropriate accommodation of the significant local concerns that prompted § 2 of the Twenty-first Amendment and the weighty federal interests embodied in the Commerce Clause, Supremacy Clause, and Sherman Act. In light of the background of the instant matter, respondent does question whether this is the appropriate vehicle for seeking the accommodation. CRLDA, not the involved state officials, is carrying this fight. However, in the event that the Court is of the view that it should proceed to the merits, the correct result under the law is affirmance of the judgment below.



I  
THE WINE RPM PROVISIONS IN DISPUTE  
CONTRAENE THE ANTITRUST LAWS

**A. The Wine RPM Provisions Compel Price Fixing Forbidden By Federal Law**

Petitioner seeks to prevent price competition among wine retailers. Agreement by petitioner's members to accomplish this would constitute *per se* illegal horizontal price fixing. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). Similarly, agreements to fix the price at which the purchaser of a commodity may resell ("vertical" price fixing) were ruled illegal by this Court as early as 1911. *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373.

The wine RPM provisions produce price fixing due to state compulsion, rather than the voluntary, private "contract, combination or conspiracy" covered by the terms of § 1 of the Sherman Act. Accordingly, those who have complied with the wine RPM statutes are not subject to anti-trust liability. However, this does not save the statutes. Thirty years ago, this Court confronted arguments that an analogous fair trade system survived the Sherman Act because state law, not private agreement, was the source of the price fixing activities. *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951). See, e.g., Brief for Respondents 8; *Amicus* Brief for National Ass'n of Retail Druggists, et al. 8-10. The Court rejected this point and invalidated the state statute at issue, ruling that the state may not simply command private conduct which the Sherman Act otherwise forbids. 341 U.S. at 389. Thus, the wine RPM statutes strike at the core of fundamental federal antitrust laws and are invalid unless saved by the Twenty-first Amendment or the state action doctrine.

**B. Congress Did Not Exclude Alcoholic Beverages From The 1975 Repeal Of The Federal Fair Trade Exemption From The Antitrust Laws**

As the California Supreme Court pointed out in its *Corsetti* decision, the repeal of the federal fair trade exemption in 1975 brought the state's alcoholic beverage RPM systems squarely into conflict with the Sherman Act. *Rice v. ABC Appeals Bd.*, Pet. App. C at 8-19. Petitioner and the AG contend that Congress excepted alcoholic beverages from the effect of the repeal of the federal fair trade exemption (which restored the full ban of the Sherman Act and the FTC Act against price fixing). They point to passages in House and Senate Reports accompanying the federal repealer in 1975. Pet. Br. 22; AG Br. 23-25. Their contention is meritless. The text of the Consumer Goods Pricing Act of 1975 plainly and literally applies to all articles, alcoholic beverages or otherwise.<sup>17</sup> Moreover, the report passages referred to stand not for what petitioner and the AG assert but for precisely the opposite point. They demonstrate a congressional awareness that the 1975 repealer covered alcoholic beverages; they show no intent to exempt alcoholic beverages from the repeal of the McGuire

<sup>17</sup> The Consumer Goods Pricing Act of 1975 reads as follows:

An Act to amend the Sherman Antitrust Act to provide lower prices for consumers.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That this Act may be cited as the "Consumer Goods Pricing Act of 1975".

SEC. 2. Section 1 of the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", approved July 2, 1890 (15 U.S.C. 1), is amended by striking out the colon preceding the first proviso in the first sentence and all that follows down through the end of such sentence and inserting in lieu thereof a period.

SEC. 3. Paragraphs (2) through (5) of section 5(a) of the Federal Trade Commission Act (15 U.S.C. 45(a)) are repealed and paragraph (6) of such section 5(a) is redesignated as paragraph (2).

SEC. 4. The amendments made by sections 2 and 3 of this Act shall take effect upon the expiration of the ninety-day period which begins on the date of enactment of this Act.



and Miller-Tydings Acts. To be sure, the passages acknowledge that the Twenty-first Amendment may create a special situation for alcoholic beverage fair trade, despite the 1975 repealer. However, the reports are otherwise of no significance to this case. The House Report simply flags the issue, offering no opinion on the outcome of the constitutional question presented, and simply deferring to the independent body of law under the Twenty-first Amendment, whatever it provides. The Senate Report offers an opinion on resolution of the constitutional issue, but as shown below, the opinion expressed in the report was not addressed to the kind of wine RPM engaged in by California.

The passage from the House Report cited by the AG is the Report's only reference to alcoholic beverages. With a more accurate emphasis, the passage reads:

Some concern was expressed in the hearings before the subcommittee that the repeal of Miller-Tydings and McGuire might impinge in some fashion upon the power of States to regulate liquor traffic under the second section of the 21st amendment. No such effect is intended. *The repeal would terminate the power of liquor manufacturers to set resale prices under a general "fair trade" statute, but would leave unimpaired whatever power the States have under the 21st amendment to regulate the importation of liquor from outside the State.* (emphasis added).

H.R. Rep. No. 94-341, 94th Cong., 1st Sess. 3 n.2 (1975).

Thus, the Report clearly shows that alcoholic beverages are subject to the general fair trade repealer, and that the Committee wished to stress the obvious—that the repealer was not intended to and could not alter the effects, whatever they are, of an independent provision of the Constitution. The Committee declined to opine on the outcome of the Twenty-first Amendment inquiry. However, the Committee did reveal that, as does respondent, it reads the Twenty-

first Amendment as giving states power only "*to regulate the importation of liquor.*"<sup>18</sup>

The passage from the Senate Report asserted by the AG and petitioner states:

Liquor will not be affected by the repeal of the fair trade laws in the same manner as other products because the Twenty-First Amendment to the Constitution gives the States broad powers over the sale of alcoholic beverages. Thus, while repeal of the fair trade laws generally will prohibit manufacturers from enforcing resale prices, alcohol manufacturers may do such in States which pass price fixing statutes pursuant to the Twenty-First Amendment.

S. Rep. No. 94-466, 94th Cong., 1st Sess. 2 (1975).

As in the case of the House Report, the Senate Report, confirming the text of the 1975 repealer, demonstrates that alcoholic beverages are within the scope of the repeal of fair trade. Unlike the House Report, the Senate Report offers an opinion that some state "price fixing" statutes for alcoholic beverages may survive the 1975 federal repealer because of the Twenty-first Amendment. In other words, although one shield for price control statutes (the McGuire and Miller-Tydings exemption) is gone, another may remain—the Twenty-first Amendment.

A statement of opinion by Congress, much less one Committee of Congress, cannot bind this Court on the constitutional question at issue. Thus, the opinion expressed in the Senate Report is entitled to little weight here. Moreover, if any weight were to be given it, the opinion still cannot assist petitioner and the AG, when it is considered in the context in which it was offered. Hearings before the

<sup>18</sup> A further significant aspect of the Committee's language is the distinction made between private power to "set" prices and state power to regulate the importation of alcoholic beverages. Clearly, the Committee expressed no intention to allow private persons to establish resale prices.

pertinent Senate subcommittee demonstrate that the opinion is not addressed to RPM statutes such as those at issue, in which private parties rather than the state set the level of prices. Rather, the reference to "price fixing statutes" passed by states pursuant to the Twenty-first Amendment, and thus the gratuitous opinion about that Amendment, is directed to statutes under which the state itself establishes prices, which is not the case here. The transcript of the Senate subcommittee hearings on S. 408, a predecessor to the 1975 repealer, demonstrates that the subcommittee's focus was on state statutes under which alcoholic beverages are "either sold by state liquor stores or the prices are set by state law."<sup>19</sup> The validity of state statutes under which a state monopolizes the sale of alcoholic beverages or exercises actual control over prices is not before the Court in this case, and situations of that kind raise considerations not presented here. Yet the Senate Report passage cited by petitioner and the AG, properly understood, refers only to such situations.

<sup>19</sup>A Bill To Repeal The Fair Trade Laws: Hearings on S. 408 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess. 66 (1975) (statement of Subcommittee counsel). See *id.*, 68:

The 21st Amendment to the Constitution, which repeals prohibition, gave the states broad power over the sale of alcohol and gave them the power to set prices on it. Thus, it is possible, even if the fair trade laws are repealed, for individual states to pass laws which would control the price of alcohol. (emphasis added).

## II

**THE WILSON AND WEBB-KENYON ACTS PROVIDE NO GROUND FOR REVERSAL IN THIS CASE, ON THE MERITS AND BECAUSE THEY WERE NOT PROPERLY PRESENTED BY PETITIONER. AS DIRECT PREDECESSORS OF § 2 OF THE TWENTY-FIRST AMENDMENT, THEIR REAL SIGNIFICANCE IS TO ILLUMINATE THE LIMITED PURPOSE OF § 2**

**A. Petitioner cannot espouse the Wilson and Webb-Kenyon Acts as grounds for reversal in this Court**

Petitioner's brief in the court below contains a cursory, one-line reference to the Webb-Kenyon Act, 27 U.S.C. § 122, and no mention of the Wilson Act, 27 U.S.C. § 121. R. 232. Not surprisingly, the court did not pass on those statutes. CRLDA's petition for review to the highest state court, which was denied, contains no mention whatsoever of Wilson or Webb-Kenyon. R. 380 *et seq.* Nor did petitioner include them within the questions presented in its petition to this Court. Since the statutes were not briefed, pressed or passed upon in the courts below and not included within the questions presented to this Court, petitioner cannot rely on them as a ground for reversal now. *E.g., Tacon v. Arizona*, 410 U.S. 351, 352 (1973); *California v. Taylor*, 353 U.S. 553, 557 n.2 (1957); Supreme Court Rule 23.1(c).

**B. On the merits, the Wilson and Webb-Kenyon Acts provide no support to petitioner. Their sole significance is to illuminate the narrow historical background of § 2 of the Twenty-first Amendment**

Although petitioner has not preserved them as independent grounds for reversal, it does not follow that no heed should be paid to the Wilson and Webb-Kenyon Acts. The Acts comprise a significant part of the federal statutory evolution leading up to the Twenty-first Amendment. They help demonstrate that the purpose of § 2 was to help dry states keep dry despite the repeal of Prohibition, but not to create an absolutist regime of plenary state power over all aspects of the alcoholic beverage industry.



Petitioner's analysis of the history of Wilson and Webb-Kenyon consists of a selective and inaccurate summary of the relevant cases and reflects a fundamental misunderstanding of why the statutes came about and what they were aimed at accomplishing. This occurs because of a failure to take into account the practical effects of Commerce Clause doctrine as it was defined by this Court at the time those statutes were enacted. Wilson and Webb-Kenyon simply permit the states to regulate what they previously could not deal with at all—importation of alcoholic beverages.

Wilson and Webb-Kenyon do not control in the case of a clash *between* federal and state regulation. In such instances, the statutes are irrelevant. They do not remove the power of Congress affirmatively to regulate (as in the anti-trust laws), which, of course, Congress can do whenever the activity regulated affects interstate commerce.

The history of the treatment of alcoholic beverages before the enactment of the Twenty-first Amendment does not illustrate, despite petitioner's suggestion, general repeal of the Commerce Clause in this field. Pet. Br. 29-37. Rather, it demonstrates a narrow congressional purpose to permit those states wishing to prohibit trafficking in liquor within their borders, i.e., "dry states," to do so without being frustrated by shipments of liquor from outside their boundaries under "stream of commerce" concepts adopted by this Court. Under those concepts, a state's authority to regulate commerce in domestic liquors did not extend to a power to limit articles *in* interstate commerce, even if Congress took no action. Alcoholic beverages in interstate commerce were treated like any other commodity, *Leisy v. Hardin*, 135 U.S. 100, 110 (1890), and thus the power to regulate them resided exclusively in Congress. *E.g.*, *Bowman v. Chicago & Northwestern Ry. Co.*, 125 U.S. 465 (1888). The states had *no power* to regulate alcoholic bev-

erages *in interstate commerce*. *Leisy v. Hardin*, *supra*, 135 U.S. at 125.

In *Brown v. Maryland*, 12 Wheat. 419 (1827), the Court held that state power to tax imports began at the point at which the imported goods were commingled with the mass of other goods in the state. In *Leisy*, following *Brown*, the Court adopted the commingling concept, held alcoholic beverages exempt from regulation until commingling occurred, and determined that commingling did not occur until the original package in which the goods were shipped was broken or sold.

*Leisy* was decided on April 28, 1890. Immediately, Senator Wilson of Iowa introduced a bill to overrule the effects of *Leisy* which was reported to the floor of the Senate from the Judiciary Committee on May 14, 1890. 21 Cong. Rec. 4642 (1890). The bill had thus been introduced, passed through committee and reported to the Senate within the 17 days following the Court's decision in *Leisy*.

Debate on the bill began just six days later on May 20th. *Id.*, 4954. A review of the debate reveals that the Wilson Act was enacted for the narrow purpose of overruling *Leisy* and permitting prohibition states to arrest the sale of liquor in its original package. Accordingly, the Wilson Act is popularly known as "The Original Packages Act." 27 U.S.C. § 121.

Senator Wilson began the debate on the bill which was to become the Wilson Act by offering to explain its nature, character and extent. 21 Cong. Rec. 4954 (1890). He quoted the Court's language in *Leisy* which explained that the states had no power to regulate interstate commerce absent congressional action and suggested that Congress take action to permit the states to regulate. *Ibid.* Senator Wilson then stated: "The bill in its amended form is a response to the suggestion contained in this declaration of



the Court." *Ibid.* He went on to explain: "If a state shall desire prohibition, it can adopt it and exercise it and enforce it under the provisions of this bill." *Ibid.* Thus, Senator Wilson expressed a desire to protect the dry states by legislatively overruling *Leisy* and permitting states to act even though alcoholic beverages remained in their original packages.

The language of the Wilson Act shows that Congress did not intend to divest itself of any power to regulate alcoholic beverages, but desired solely to effectuate Senator Wilson's narrow goal of permitting dry states to remain dry. In response to the *Leisy* holding, Congress simply redefined the circumstances in which alcoholic beverages would be *in commerce* and thus totally beyond the powers of the states under then-prevailing Commerce Clause doctrine. The Act provides as follows:

All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, *to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.* (emphasis added).

The Wilson Act thus served the narrow purpose of overruling *Leisy*. It made imported liquor subject to state regulation by denying alcoholic beverages in the original package the protection otherwise accorded to goods in commerce. It did so by providing that such beverages would no longer be *in commerce*, upon arrival in a state. Congress thus gave the states *some* additional power to regulate alcoholic beverages. The Act did not, however, remove any

pre-existing federal regulatory power or alter the effect of the Supremacy Clause, which ordinarily dictates that state law is invalid if it conflicts with federal law.

The Wilson Act was rendered virtually useless to accomplish even its limited purpose by this Court's decision in *Rhodes v. Iowa*, 170 U.S. 412 (1898). *Rhodes* concerned the point at which state law could reach alcoholic beverages which had been shipped interstate. The Court held the beverages immune from state control until received by the consignee. The Wilson Act made state law applicable upon the "arrival" of liquor within the state. In *Rhodes*, the Court defined "arrival" as delivery to the consignee, rather than any preceding point in shipment. *Id.*, 423. Under this ruling, the states were powerless to forbid their citizens from receiving liquor which had been acquired by a sale in interstate commerce.

In the years following *Rhodes* the mail order liquor business thrived, as the Court's decision had made prohibition states powerless to ban receipt of liquor obtained by mail order purchases in interstate commerce. Despite numerous challenges to the Court's reading of the Wilson Act, there was no departure from the *Rhodes* analysis. See, e.g., *American Express Co. v. Iowa*, 196 U.S. 133 (1905); *Heyman v. Southern Ry. Co.*, 203 U.S. 270 (1906); *Adams Express Co. v. Kentucky*, 206 U.S. 129 (1907). The continuing practice of mail order shipment of alcoholic beverages to consignees in prohibition states ultimately led to the enactment of Webb-Kenyon.

The Webb-Kenyon Act was sponsored by Representative Webb of North Carolina and Senator Kenyon of Iowa, both representing prohibition states. The legislative history of the Act is typified by the remarks of Senator Sanders of Tennessee, another prohibition state, who opened the Senate debate as follows:

This bill relates to nothing but the shipment of intoxicating liquors from one State into another State where it is to be sold in violation of State laws concerning same.

49 Cong. Rec. 699 (1912). Speaking of Tennessee's own prohibition law, Senator Sanders stated that:

These laws are enforced in most of the counties fairly well, but are violated in the many counties, especially those having large cities, on account of the corrupting influence of the large number of mail-order liquor houses. . . . *Id.*, 700.

Senator Sanders then launched into a tirade on the evils of the mail order business. *Ibid.*

The language chosen by the drafters of the Act is addressed to the narrow purpose of closing the gaps left open by the Wilson Act and thus assisting dry states to remain dry. Webb-Kenyon provides, in pertinent part:

The shipment or transportation . . . of any . . . intoxicating liquor of any kind, from one State . . . into any other State . . . or from any foreign country into any State . . . which said . . . intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State . . . is prohibited.

Webb-Kenyon is an anti-mail order statute. It forbids *importation* of alcoholic beverages intended to be received, possessed or used in violation of state law, regardless of the situs of the sale. Like the Wilson Act, Webb-Kenyon does not deprive Congress of any of its regulatory powers over alcoholic beverages or generally exempt transactions in such beverages from the dictates of the Commerce Clause and the Supremacy Clause. Petitioner's assertion

that "liquor was removed from the Commerce Clause" by Webb-Kenyon, Pet. Br. 31, is nonsense.<sup>20</sup>

Petitioner devotes the majority of its Webb-Kenyon discussion to a series of quotations from *Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U.S. 311 (1917). The only quotation that counts is as follows:

. . . [T]here is no room for doubt that [the Webb-Kenyon Act] was enacted simply to extend that which was done by the Wilson Act; that is to say, its purpose was to *prevent the immunity characteristic of interstate commerce* from being used to permit the receipt of liquor through such commerce in states contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws at naught. (emphasis added).

<sup>20</sup>Petitioner suggests that the 1935 "reenactment" of Webb-Kenyon somehow supports its position. Pet. Br. 36. This suggestion is equally devoid of merit.

Webb-Kenyon was reenacted as part of clean-up legislation in 1935 which restored order to federal regulation of liquor after the repeal of prohibition. The specific purpose for the reenactment of Webb-Kenyon as part of this legislation was to insure that the contemporaneous repeal of the Cullen Beer Act (which blocked the importation of 3.2 beer into dry states in language analogous to Webb-Kenyon) would not be misinterpreted to permit unwanted importation of 3.2 beer. S. Rep. No. 1330, 74th Cong., 1st Sess. 5 (1935).

Moreover, the brief discussion of Webb-Kenyon during the debates on the 1935 legislation confirms respondent's view of the correct interpretation of the Act. Senator Ashurst presented the reenactment bill to the Senate. His only comments on Webb-Kenyon are as follows:

This is a bill codifying the present liquor laws. It repeals certain laws which are obsolete—for example, war prohibition. It also repeals what we call the Cullen Beer Act, providing for the sale of beer containing 3.2 per cent alcohol by weight. *It preserves what is denominated as the Webb-Kenyon law, which protects the dry states.* I need not explain what that means. Senators know what the Webb-Kenyon law is . . . . (emphasis added).

79 Cong. Rec. 13409 (1935).

*Id.*, 324. This explication of the Act is fatal to petitioner's attempted reliance on Webb-Kenyon. In this passage, the Court made it clear that Webb-Kenyon is only an extension of the Wilson Act, with the simple purpose of preventing the receipt of liquor through interstate commerce in violation of state laws. *Clark* simply holds that Congress can permit the states to regulate alcoholic beverages although those beverages are in commerce. It says nothing about the resolution of conflicting federal and state law nor does it in any way temper Congress' power, when it chooses to exercise it, under the Commerce Clause.

Petitioner makes a similar error in citing *National Railroad Passenger Corp. v. Miller*, 358 F. Supp. 1321 (D. Kan.) (three judge court), *aff'd*, 414 U.S. 948 (1973). In *Miller*, the court observed that Webb-Kenyon "took away the protection of interstate commerce from all receipt and possession of liquor prohibited by State law." 358 F. Supp. at 1326. This comment means no more than that receipt and possession of alcoholic beverages in violation of state law cannot be defended simply by establishing that the beverages were "in commerce." As the district court noted in *Miller*, Kansas, the state at issue, which sought to block the sale of liquor by the drink on Amtrak trains, had a long history of prohibition: "Perhaps no state has had more rigid laws." *Id.*, 1327. The state had a particular antipathy to saloons, even if they happened to be on railroad trains. *Id.*, 1328. All that *Miller* holds is that the Webb-Kenyon Act permitted Kansas to block importation of alcoholic beverages via a movable saloon—a dining car—where local law forbade sales by the drink. It is impossible to extrapolate from that holding to the reading of Wilson and Webb-Kenyon engaged in by petitioner.

Wilson and Webb-Kenyon are narrow statutes designed to help prohibition states remain dry. The statutes simply

redefine the "in commerce" concepts of *Brown v. Maryland* and *Leisy v. Hardin*, to permit the states to act when Congress does not. Nothing in the text or history of either of these statutes shows that Congress intended to eliminate any of its powers over interstate commerce or to otherwise exempt alcoholic beverages from important bodies of national law. The statutes are helpful here only because their text and history demonstrate the limited scope and purpose of § 2 of the Twenty-first Amendment, into which they were embodied.

### III

#### IN THIS INSTANCE THE CORRECT ACCOMMODATION OF § 2 OF THE TWENTY-FIRST AMENDMENT AND THE COMMERCE AND SUPREMACY CLAUSES IS RECOGNITION OF THE PREVALENCE OF THE FEDERAL ANTITRUST LAWS

##### A. The central purpose of § 2 of the Twenty-first Amendment was to help dry states remain dry

The text of § 2 of the Twenty-first Amendment scarcely supports the reading given it by petitioner. Section 2 prohibits the "transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof. . . ." The provision by its explicit terms specifically addresses "*transportation or importation*" of liquor "*into any State . . .*" (emphasis added), the key concept that governs every other word in the Section. It requires a tortured reading indeed to convert the language of § 2 into an across-the-board repeal of the federal antitrust laws or into a plenary grant of authority to the states over all aspects of the alcoholic beverage business, whether or not related to unwanted importation. Petitioner espouses such a reading, but the text of the provision will not support it, for reasons immediately evident upon consideration of the background and history of § 2.



As noted above, the practical enforcement problems confronted by dry states in an era when prohibition was in vogue prompted the Wilson Act and, when that failed, the Webb-Kenyon Act. To preserve and solidify what was accomplished in those Acts, a derivation of the text of Webb-Kenyon was incorporated into the Twenty-first Amendment, as § 2. As this Court stated in *Craig v. Boren*, 429 U.S. 190, 205-06 (1976):

The history of state regulation of alcoholic beverages dates from long before adoption of the Eighteenth Amendment. In the License Cases, the Court recognized a broad authority in state governments to regulate the trade of alcoholic beverages within their borders free from implied restrictions under the Commerce Clause. Later in the century, however *Leisy v. Hardin* undercut the theoretical underpinnings of the License Cases. This led Congress, acting pursuant to its powers under the Commerce Clause, to reinvigorate the state's regulatory role through the passage of the Wilson and Webb-Kenyon Acts. . . . With passage of the Eighteenth Amendment, the uneasy tension between the Commerce Clause and state police power temporarily subsided.

The Twenty-first Amendment repealed the Eighteenth Amendment in 1933. The wording of § 2 of the Twenty-first Amendment closely follows the Webb-Kenyon and Wilson Acts, expressing the framers' clear intention of constitutionalizing the Commerce Clause framework established under those statutes. (footnotes and citations omitted).

As Mr. Justice Marshall stated in his dissenting opinion in *California v. LaRue*, 409 U.S. 109, 134 (1972), § 2 "by its terms speaks only to state control of the *importation* of alcohol, and its legislative history makes clear that it was intended only to permit 'dry' states to control the flow of liquor across their boundaries despite potential Commerce Clause objections." Mr. Justice Marshall fur-

ther recounted the history of § 2 in a footnote to the above statement, which reads as follows:

The text of the Amendment is based on the Webb-Kenyon Act, which antedated prohibition. The Act was entitled "An Act Divesting intoxicating liquors of their interstate character in certain cases," and was designed to allow "dry" States to regulate the flow of alcohol across their borders. . . . The Twenty-first Amendment was intended to embed this principle permanently into the Constitution. As explained by its sponsor on the Senate floor, "to assure the so-called dry States against the importation of intoxicating liquor into those States, it is proposed to write permanently into the Constitution a prohibition along that line.

"[T]he pending proposal will give the States that guarantee. When our Government was organized and the Constitution of the United States adopted, the States surrendered control over and regulation of interstate commerce. This proposal is restoring to the States, in effect, the right to regulate commerce respecting a single commodity—namely, intoxicating liquor." 76 Cong. Rec. 4141 (remarks of Sen. Blaine).

*Id.*, n.14 (citations omitted). See also *United States v. Tax Comm'n of Miss.*, 412 U.S. 363, 378 (1973) (Section 2 is "a provision designed only to augment the powers of the States to regulate the importation of liquor destined for use, distribution or consumption in its own territory. . . .").

Other courts that have examined the scope and purpose of § 2 have also concluded that it "represents the incorporation of a somewhat narrowed version of the Webb-Kenyon Act . . . into the Constitution." *Sail'er Inn, Inc. v. Kirby, Director of ABC*, 5 Cal. 3d 1, 11 (1971) (citations

omitted).<sup>21</sup> For example, in ruling that § 2 does not create a general antitrust immunity, the Tenth Circuit stated:

The general import of [§ 2] is to prohibit importation into a state for delivery or use therein in violation of the laws of that state. Its main purpose, then, would appear to have been to give a dry state power to protect itself from importation of liquor into the state for use therein.

*Lamp Liquors, Inc. v. Adolph Coors Co.*, 563 F.2d 425, 429 (1977).<sup>22</sup>

<sup>21</sup>As the court in *Sailor Inn* also pointed out:

The Twenty-first Amendment clearly was not intended to work . . . a wholesale "repeal" of the commerce clause in the area of alcoholic beverage control. When national prohibition was terminated by section 1 of the Twenty-first Amendment, section 2 was added as a "saving clause" to protect the laws of states which chose to retain prohibition against a possible conflict with the commerce clause. . . . The language of the amendment clearly reflects the purpose, since it prohibits the importation or transporting of liquor only into states where such importation will be in violation of the laws thereof.

*Ibid.* (citations omitted).

<sup>22</sup>The literature on § 2, both recent and in the years soon after enactment of the Amendment, provides a chorus of support for reading the Section, consistent with its terms, as a constitutional embodiment of Wilson and Webb-Kenyon. *E.g.*, Carr, *Liquor and the Constitution*, 7 Law & Contemp. Prob. 709, 710 (1940) (Section 2 "was enacted in an effort to guarantee to the states by the Constitution the same freedom to control liquor that the Webb-Kenyon Act had given them by statute."); Note, *Retail Price Maintenance for Liquor: Does the Twenty-first Amendment Preclude a Free Trade Market?* 5 Hastings Con. L. Q. 507, 513 (1978) ("Section two of the Twenty-first Amendment was added merely to enable the dry states to prohibit, without commerce clause restraints, the importation of liquor."); Comment, *The Concept of State Power Under the Twenty-first Amendment*, 40 Tenn. L. Rev. 465, 471 (1973) (There is "little doubt that section 2 was included to protect the dry states by making the Webb-Kenyon Act a permanent part of the Constitution."); Note, *The Twenty-first Amendment Versus the Interstate Commerce Clause*, 55 Yale L. J. 815, 816-17 (1946) ("The sole function of Section Two was to render an iron-clad protection to the 'dry states' against any possible influx of intoxicants from non-prohibition areas. This purpose was to be achieved by transplanting into the Constitution pre-existing legislation: the Webb-Kenyon Act."); Comment, 25 Calif. L. Rev. 718, 725, 728 (1937) (Section 2 "was an enactment into the Constitution of the Webb-Kenyon Act. . . .").

A review of the congressional debates on § 2 makes quite clear that the above authorities correctly construe the Section. The text of the Twenty-first Amendment originated in the Senate as S.J. Res. 211, see 76 Cong. Rec. 4138-39 (1933), and the Senate debates, which occurred on February 15 and 16, 1933, *id.*, 4138-79, 4215-32, are the only "legislative history" of significance with regard to the purpose of § 2. The key passages of the debates occur at *id.*, 4140-43, 4170-71, and involve Senators Blaine and Borah.

The sponsors of § 2, exponents of prohibition, were concerned that the repealer provision, § 1, would throw the dry states back to the shaky protection of the Webb-Kenyon Act. The constitutionality of that Act was narrowly upheld by a divided Court in *Clark Distilling Co. v. Western Maryland Ry. Co.*, *supra*. Earlier, then President, subsequently Chief Justice Taft and his Attorney General had found the Act unconstitutional. (It passed over Taft's veto. 76 Cong. Rec. 4170 (remarks of Senator Borah).) Moreover, the Court had been known to change its mind about state power to ban liquor. *See, e.g., ibid.; Leisy v. Hardin, supra.*

The solution was to build Webb-Kenyon into the Constitution through § 2. That this was undeniably the purpose of § 2 is illustrated by the remarks of Senator Blaine, the senator in charge of S.J. Res. 211, § 2 of which became (without change) § 2 of the Amendment. 76 Cong. Rec. 4142. Senator Blaine reported to the full Senate the views of the Senate Judiciary Committee, the sponsor of S.J. Res. 211, regarding § 2, as follows:

In the case of *Clark* against Maryland Railway Co. there was a divided opinion [about the constitutionality of Webb-Kenyon]. There has been a divided opinion in respect to the earlier cases, and that di-



vision of opinion seems to have come down to a very late day. So, to assure the so-called dry States against the importation of intoxicating liquor into those States, it is proposed to write permanently into the Constitution a prohibition along that line. Mr. President, the pending proposal will give the States that guarantee . . . .

*Id.*, 4141. See *id.*, 4140-42 (Senator Blaine's report on the views of the Senate Judiciary Committee on § 2).

Similarly, Senator Borah, a member of the Judiciary Committee, a participant in the earlier congressional debates on Webb-Kenyon, see 49 Cong. Rec. 702 (1912), and a leading opponent of repeal, argued as follows in response to an amendment that would have eliminated § 2 ". . . [T]his is the question of striking out Section 2, which provides for the protection of the so-called dry States . . . It does not seem to me that we can afford to strip the amendment of all effort to protect the dry States." *Id.*, 4170. Borah went on to argue that the Webb-Kenyon Act does not provide "sufficient protection to the dry States" as it "is still of doubtful constitutionality," and the elimination of Section 2 would mean "asking the dry states to rely upon the Congress of the United States to maintain indefinitely the Webb-Kenyon law." *Ibid.*

Senator Walsh, another prohibitionist, likewise supported § 2. He did so on precisely the same grounds (in response to the same Commerce Clause loopholes opened by the Court in *Leisy* and *Rhodes*, *supra*) that prompted Webb-Kenyon:

It is true that the original Constitution authorizes Congress to prohibit the transfer of intoxicating liquors in interstate commerce. It is held, however, that that authority simply indicates the intention to have commerce free except as Congress may otherwise direct. It has been held that under the existing Constitution the right obtains on the part of any

citizen to pass his goods into another State, and they remain under the protection of the Federal Constitution until they actually reach the hands of the consignee; so that they can not be stopped at the State line nor there fall under the jurisdiction of the State authorities, but the goods will not fall under the jurisdiction of the State authorities until they actually get into the possession of the consignee who may live in the center of the State. Meanwhile all manner of opportunity is afforded for the diversion of the intoxicating liquors from the consignee to whom they are addressed. Likewise, even then, the intoxicating liquor is protected by the commerce clause; if it remains on the siding in the car of the transportation company, it still remains under that protection, and if it goes into a warehouse belonging to the transportation company it remains under the protection of the Federal statute, and is immune from any control by State statutes until it actually reaches the possession of the consignee. The purpose of the provision in the resolution reported by the committee was to make the intoxicating liquor subject to the laws of the State once it passed the State line and before it gets into the hands of the consignee as well as thereafter. *Id.*, 4219.

In sum, the legislative history of § 2, the provision relied on by petitioner, illustrates a purpose simply to allow prohibition to those states that really wanted it. It does not indicate that the Amendment was designed to do more than that.

S. J. Res. 211 originally contained a § 3, which was voted down before the proposed amendment cleared that chamber. *Id.*, 4179. Section 3, as proposed, provided that: "Congress shall have concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold." *Id.*, 4141. Thus, despite repeal of the Eighteenth Amendment, was the power of the federal government to be extended beyond the then-believed limits of the Com-



merce Clause to reach what was then considered to be an intrastate perfidity, the saloon. *Id.*, 4141-43. Those who espouse an absolutist view of the Twenty-first Amendment cite the rejection of § 3 by the Senate as support for their position. See *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 337-38 (1964) (Black, J., dissenting); *Amicus* Brief of Virginia Beer Wholesalers Association 9-12.<sup>23</sup> The position is untenable on the face of the proposed § 3 and the actually adopted § 2.

Section 3, by its terms, was designed to extend the power of Congress to reach a very specific, local matter—"the sale of intoxicating liquors to be drunk on the premises where sold." To extrapolate from the rejection of a proposal to permit Congress to deal with a particular matter of local concern (saloons) to a conclusion that congressional power was intended to be curbed on all fronts would be a remarkable misreading—especially in light of the narrowness of the language of the section that was retained, § 2.

<sup>23</sup>The Virginia Beer Wholesalers Association twice quotes a sentence from Senator Blaine, the manager of S.J. Res. 211, which reads: "The purpose of section 2 is to restore to the States by constitutional amendment absolute control in effect over interstate commerce affecting intoxicating liquors which enter the confines of the States." Beer Br. 10, 12. Apparently this is the best quote *amicus* can find. In neither instance of quotation does the brief quote in full the preceding two sentences:

Mr. President, my own personal viewpoint upon section 3 is that it is contrary to section 2 of the resolution. I am now endeavoring to give my personal views.

76 Cong. Rec. 4143. As the preceding pages of the Congressional Record indicate, Senator Blaine was careful to distinguish between the views of the Judiciary Committee, which he represented on the Senate floor, and his personal views, which were rejected by a majority of his committee—a fact that the Virginia Beer Wholesalers Association fails to bring out. The Blaine "absolutist" quote the Association rests its brief on constituted a minority viewpoint in the Congress that considered the Twenty-first Amendment, as it has in this Court.

The text of the debates on the proposed § 3 repeatedly reveals that it was, for all intents and purposes, simply an anti-saloon provision. Saloons were universally condemned by the senatorial orators, and the drafters of S.J. Res. 211 apparently thought it necessary to empower Congress, as well as the states, to curb them to insure their demise. However, a reaction to § 3 occurred during the debates, based on the failure of federal efforts to enforce prohibition under the Eighteenth Amendment. A slim consensus developed that federal enforcement of prohibition should not be continued in any form, even if it were narrowed in focus to the banning of saloons. 76 Cong. Rec. 4145-48; 4170-78.

It must be remembered that the debates on § 3 were against the background of the Eighteenth Amendment, which had extended congressional power beyond the scope of then-prevailing Commerce Clause doctrine. Section 3 would have preserved some small part of the Eighteenth Amendment extension of congressional power, on the subject of saloons. The rejection of § 3 represents nothing more than a decision by the Senate not to attempt to preserve a limited part of the regime set up by the Eighteenth Amendment. All this meant was a refusal to retain for Congress an authority extending beyond the then-accepted limits of Commerce Clause powers.<sup>24</sup>

<sup>24</sup>See 40 Tenn. L. Rev., *supra*, at 472-73:

Throughout the Senate debates preceding adoption of the resolution proposing the amendment, there is reference to the idea that the states alone should deal with the liquor problem. Control of liquor regulation by the individual states rather than by the federal government was, of course, the purpose of section 2 of the amendment. But some of the language referring to restoration to the states of "absolute control" over traffic in intoxicating liquors has been construed as giving to the states plenary powers apparently unlimited by constitutional restrictions. Such an interpretation gives this language too broad a meaning. When originally reported out of committee, the amendment contained a section 3, not present in the enacted

Viewed in accurate context, the purpose of the Twenty-first Amendment was not to work a fundamental alteration in congressional power under the Commerce Clause. Because of "substantive" readings of the Commerce Clause by this Court in an earlier era which banned traditional state regulation of liquor even where Congress had taken no action, it was necessary to lift Commerce Clause doctrinal restrictions which inhibited those states that wished to retain prohibition. At the invitation of the Court, Congress did this itself in the Wilson and Webb-Kenyon Acts. Section 2 made this election permanent; it blocked Congress from withdrawing the permission to the states contained in those Acts to regulate liquor despite this Court's definitions of when liquor was in commerce—a permission applicable to those instances in which Congress itself had not acted. The Amendment thus permitted the states to deal with unwanted transportation and importation. But it was not intended to and by its terms did not resolve the question of the appropriate resolution of competing state and federal interests when Congress took action and when that action was not designed to force on the states liquor importation they did not want.

Actions by Congress soon after the enactment of the Twenty-first Amendment further evidence the narrow scope of § 2. In 1935, Congress enacted the Federal Alcohol Ad-

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amendment, that provided that Congress should have concurrent power with the states to regulate the sale of liquor to be consumed on the seller's premises. It was feared that this power, if retained by Congress, could be extended to all phases of liquor regulation and was therefore deleted from the proposed amendment. It was in response to the original section 3 and the retention by Congress of power to regulate liquor that references to "absolute control" by the states and similar language were used. Read in the proper context, this language cannot be taken to mean that the twenty-first amendment was intended to grant to the states powers unlimited by other constitutional provisions. (footnotes omitted).

ministration Act. 27 U.S.C. § 201 *et seq.* In so doing, Congress explicitly considered state-federal conflicts and elected to override state law. Congress found that the alcoholic beverage industries were national in scope, posing problems beyond the scope of effective state regulation. H.R. Rep. No. 1542, 74th Cong., 1st Sess. 1-2 (1935). A federal licensing requirement was imposed, reaching even those engaged wholly in intrastate commerce. 27 U.S.C. § 203(c)(1). This Court had no difficulty upholding the Act, dismissing the assertion that the Twenty-first Amendment gives the states "complete and exclusive control over commerce in intoxicating liquors, unlimited by the Commerce Clause" in seven words: "We see no substance in this contention." *William Jameson & Co. v. Morgenthau*, 307 U.S. 171, 172-73 (1939). The intrastate licensing aspect of the Act was also specifically upheld by the Eighth Circuit. *Hanf v. United States*, 235 F.2d 710, *cert. denied*, 352 U.S. 880 (1956).<sup>25</sup>

Because of the mid-1930's rulings of this Court, Congress paid close heed to the constitutionality of its enactments in general in that era and in particular in formulating the FAA Act in 1935. In introducing the bill that became the Act, its sponsor Representative Cullen assured the House:

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<sup>25</sup>After concluding that Congress intended to erect an intrastate licensing requirement, the Eighth Circuit held:

The next question is whether the Act as so interpreted is constitutional. It is conceded that the 21st Amendment did not deprive the federal government of control over the liquor traffic in interstate commerce. . . . The 21st Amendment by its terms prohibits transportation of liquors into a state in violation of the laws of such state. The ability on the part of the states to restrict liquor traffic in no way deprives the federal government of concurrent jurisdiction. Beyond a doubt the states have been given broad surveillance over liquor business within their boundaries, but it is equally certain that their jurisdiction is not plenary and exclusive.

*Id.*, 717-18 (citations omitted).



*No provision of the bill is violative of the Constitution either because it denies a fundamental right secured by the Constitution or because it invades a field of regulation reserved by the Constitution to the States.*

79 Cong. Rec. 12178 (emphasis added).

The views of the Seventy-fourth Congress are entitled to substantial weight in interpreting the Twenty-first Amendment. That Congress sat soon after enactment of the Amendment, and it made clear its understanding that the Amendment did not unwind the Supremacy Clause in the alcoholic beverage field. Its actions confirm the substance of the debates on the Amendment: the states' power to regulate alcoholic beverages was freed of the total barrier erected by past Commerce Clause doctrine, but the Amendment did not eliminate congressional power under the Commerce Clause, nor did it subordinate congressional power to the states.

**B. This Court's Decisions Confirm That § 2 Does Not Eviscerate The Commerce Clause Powers of Congress Over Matters of Substantial National Concern**

This Court's first four decisions under § 2 were authored by Mr. Justice Brandeis. *State Bd. of Equalization v. Young's Market*, 299 U.S. 59 (1936); *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1938); *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391 (1939); *Finch v. McKittrick*, 305 U.S. 395 (1939). All of the cases upheld state statutes directed at importation, which was not surprising, since unwanted importation was the core concern of § 2. Yet the approach taken in the Brandeis opinions, particularly the refusal to examine the history of § 2, *Young's Market*, 299 U.S. at 63-64; *Mahoney*, 304 U.S. at 404, suggested that the Amendment was to be read as eliminating Congress' powers over liquor under the Commerce Clause, and conceding the area exclusively to the states. *Indianapolis Brewing*, 305 U.S. at 394; *Finch*,

305 U.S. at 398.<sup>26</sup> However, subsequent rulings by this Court have read § 2 in a manner far more obedient to its text and history.

In the context of an antitrust challenge to the distilled spirits statute adopted by New York after it dropped RPM, this Court declared in *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 42 (1966), that the "second section of the Twenty-first Amendment has not operated totally to repeal the Commerce Clause in the area of the regulation of traffic in liquor."

In *Idlewild, supra*, 377 U.S. at 330-32 (1964), the Court eliminated the possibility that the early Brandeis opinions had converted the Twenty-first Amendment into a repeal of the Commerce Clause:

This Court made clear in the early years following adoption of the Twenty-first Amendment that by virtue of its provisions a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders.

. . . . .

<sup>26</sup>In addition to the Brandeis decisions, several individual Justices have read § 2 as an absolute grant of power to the states, overriding national interests. The strongest statement of this position appears in Mr. Justice Black's dissenting opinion, joined by Mr. Justice Goldberg, in *Idlewild, supra*, 377 U.S. at 334-40 (legislative history of Amendment shows return of "absolute control" over liquor to states, freed of all Commerce Clause restrictions). See also *Dept. of Rev. v. James B. Beam Distilling Co.*, 377 U.S. 341, 347-48 (1964) (Black, J., dissenting, joined by Goldberg, J.); *United States v. Frankfort Distilleries*, 324 U.S. 293, 300-02 (1945) (Frankfurter, J., concurring). The "absolutist" views appearing in these opinions by individual Justices have not been adopted by any Court majority.

The absolutist views expressed by Justice Black in his mid-1960's dissenting opinions represent a rigidification of less doctrinaire positions he espoused earlier as a Justice and as a Senator joining in the debates on promulgation of the Twenty-first Amendment. See *Carter v. Virginia*, 321 U.S. 131, 138 (1944) (Black, J., concurring) (open question as to the "precise amount of power" the Twenty-first Amendment left in Congress to regulate liquor under the Commerce Clause); 76 Cong. Rec. 4177-78 (1933) (Remarks of Senator Black).



To draw a conclusion from this line of decisions that the Twenty-first Amendment has somehow operated to "repeal" the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification. If the Commerce Clause had been *pro tanto* "repealed" then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor. Such a conclusion would be patently bizarre and is demonstrably incorrect.

. . . . .

Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case.

To be sure, the Twenty-first Amendment has curtailed congressional power under the Commerce Clause to some extent. Section 2, as noted above, prevents Congress from, in essence, repealing the concept of the Webb-Kenyon Act and thus destroying the power of the states to block importation because of the interstate character of liquor shipments. The Amendment "primarily created an exception to the normal operation of the Commerce Clause." *Craig v. Boren, supra*, 429 U.S. at 206.

Even here, however, the Twenty-first Amendment does not *pro tanto* repeal the Commerce Clause, but merely requires that each provision "be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case."

*Ibid.* (quoting *Idlewild, supra*). See also *California v. LaRue*, 409 U.S. 100, 114-15 (1972) (Twenty-first Amendment conveys extra powers to states but does not wholly supersede other provisions of the Constitution).

The modern Twenty-first Amendment rulings of this Court properly read the Brandeis opinions as "centered

upon importation of intoxicants, a regulatory area where the State's authority under the Twenty-first Amendment is transparently clear. . . ." *Craig v. Boren, supra*, 429 U.S. at 207. See *California v. Washington*, 358 U.S. 64 (1958) (*per curiam*). Apart from state efforts to ban importation, state power plainly is not absolute, especially when the state seeks to block the actual exercise of Commerce Clause power by Congress. The Court made this point as early as 1946:

Thus, even the commerce in intoxicating liquors, over which the Twenty-first Amendment gives the states the highest degree of control, is not altogether beyond the reach of the federal commerce power, at any rate when the state's regulation squarely conflicts with regulation imposed by Congress governing interstate trade or traffic. . . .

*Nippert v. City of Richmond*, 327 U.S. 416, 425 n.15 (1946) (citation omitted).

### C. This Court Has Never Held The Federal Antitrust Laws To Be Preempted By State Liquor Regulation

There is no dispute that the Twenty-first Amendment creates "an important distinction between state power over the liquor traffic and state power over commerce in general." *Duckworth v. Arkansas*, 314 U.S. 390, 398 (1941). But this Court has never held that state power over alcoholic beverages includes the power to eviscerate the antitrust laws. Rather, it has recognized the application of the Sherman Act to intrastate sales of alcoholic beverages, e.g., *Burke v. Ford*, 389 U.S. 320 (1967) (*per curiam*), and rejected claims that the Twenty-first Amendment wholly preempts the operation of the Sherman Act. *United States v. Frankfort Distilleries*, 324 U.S. 293 (1945) (opinion of

the Court by Black, J.).<sup>27</sup> On one occasion, the Court rejected an antitrust attack on a state liquor statute (which required an "affirmation" that prices charged in the state did not exceed those elsewhere). However, this decision rested on a conclusion that the state statute on its face did not appear to require activity that would violate the antitrust laws and there was, accordingly, no conflict between state and federal law. *Seagram, supra*, 384 U.S. at 45-46. The Court in *Seagram* plainly did not conclude that the Sherman Act was obviated by the Twenty-first Amendment. To the contrary, because it reviewed the antitrust questions presented, *Seagram* is a holding that the antitrust laws apply in general to alcoholic beverages, despite the presence of potentially conflicting state law.

As shown by *Seagram*, this Court, out of deference to federalism concerns, has made clear that it will proceed with extreme caution before concluding that state law clashes with the requirements of federal law. It has never found a conflict between state alcoholic beverage law and the antitrust laws. Petitioner's brief would make it appear that the previous decisions of this Court have resolved the question of a square conflict between such state laws and congressional will expressed in the antitrust laws or other legislation deriving from the Commerce Clause. In fact, the Court has specifically reserved judgment on this question on a number of occasions.

In *Frankfort Distilleries*, the Court found no conflict and enforced the federal antitrust laws. At the close of its opinion, the Court stated that it was not presented with:

<sup>27</sup>Lower federal courts have also rejected the contention that the Twenty-first Amendment repeals the antitrust laws for alcoholic beverages. See, e.g., *Lamp Liquors, Inc. v. Adolph Coors Co.*, 563 F.2d 425, 429 (10th Cir. 1977) (Section 2 does not "seek to authorize the granting of antitrust exemption or immunity."); *United States v. Erie County Malt Beverage Distrib. Ass'n*, 264 F.2d 731 (3d Cir. 1959).

... a case in which the Sherman Act is applied to defeat the policy of the state. That would raise questions of moment which need not be decided until they are presented.

*Id.*, 324 U.S. at 299. See also *Seagram, supra*.

No decision from this Court since *Frankfort Distilleries* has specifically resolved the question left open by Mr. Justice Black, in his opinion for the Court.<sup>28</sup> The question remains open in this Court.

#### **D. The Correct Accommodation Of Competing State And Federal Interests Is Recognition Of The Prevalence Of the Federal Antitrust Laws**

In "the context of the issues and interests at stake" in this case, the correct "accommodation of the Twenty-first Amendment with the Commerce Clause . . .," *Idlewild, supra*, 377 U.S. at 332-33, is recognition of the prevalence of the federal antitrust laws.

The state courts and the ABC Appeals Board have concluded, in determinations not open to inquiry before this Court, that alcoholic beverage RPM does not advance the state's goal of temperance and orderly marketing conditions. E.g., *In re Corsetti*, Memo. App. A at 16, 17, 19-23; *Rice v. ABC Appeals Board*, Pet. App. C at 36-38. As noted at the outset of this brief, the pertinent state governmental entities plainly do not view RPM as vital to the state's alcoholic beverage regulatory policy, or even as desirable, and do not seek reversal of the judgment below or reinstatement of RPM. Petitioner, a trade association

<sup>28</sup>See *Heublein, Inc. v. So. Car. Tax Comm'n*, 409 U.S. 275, 282 n.9 (1972):

And, though the relation between the Twenty-first Amendment and the force of the Commerce Clause in the absence of congressional action has occasionally been explored by this Court, we have never squarely determined how that Amendment affects Congress' power under the Commerce Clause. Cf. *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951).



comprised of a group of California retailers, constitutes the only real exponent of fair trade.

It is, at this late date, probably impossible to reinstate RPM for all types of alcoholic beverages in the state, because of numerous events and governmental decisions in the last several years. A reversal by this Court would, at best, create extensive confusion. Moreover, if the state truly does desire to promote temperance and to assist the survival of less efficient retailers, there are abundant (and far more effective) alternatives available that do not require the discarding of antitrust values. One alternative, allowing group purchases by retailers in order to qualify for volume discounts, has already been adopted by the state legislature following the demise of distilled spirits RPM. 1979 Cal. Stats. ch. 455.

By contrast, the RPM provisions at stake constitute a frontal assault on the Sherman Act and a harsh blow to the weighty federal interest in uniform application of the antitrust laws. The Sherman Act is central to a fundamentally important body of federal law. In 1975, Congress again rejected price fixing as a method of doing business in this country by repealing the federal exemption for fair trade. The state provisions under scrutiny directly undercut the congressional will, as expressed in an explicit exercise of power under the Commerce Clause.

Respondent does not contend that all exercises of national power must override contrary state alcoholic beverage laws. There may be certain state approaches that will override even the Sherman Act—those that are responsive to the local concerns that inspired § 2 of the Twenty-first Amendment. But such approaches are not presented in this case. The state provisions at issue here are remote from the underpinnings of the Twenty-first Amendment (which, as demonstrated, is principally addressed to a different set of problems wrapped up in state efforts at pro-

hibition). The federal provision, by contrast, is at the core of the Commerce Clause and the important national interest in preserving free and open markets.

The strongest point in favor of recognizing the prevalence of federal law in this case is that, as demonstrated above, the Twenty-first Amendment, as shown by its text and history, plainly was not intended to lead to the result sought by petitioner. It would require a substantial distortion of that Amendment to prompt reversal in the circumstances of this case. Also of considerable significance are the consequences for federal law that would flow from adoption of petitioner's position. Federal antitrust law resembles in national interest the tax, labor and securities laws. A ruling for petitioner would lead to the astounding result of casting severe doubt on the supremacy of those bodies of national law, as applied to the alcoholic beverage industries. In logic, it would, for example, threaten the application of federal minimum wage laws (which also derive directly from the Commerce Clause) to these industries—a result that simply cannot be fit within any rational scheme for delineating the contours of the Twenty-first Amendment.

In *Jatros v. Bowles*, 143 F.2d 453 (1944), the Sixth Circuit dealt with a contention that the Twenty-first Amendment rendered it impossible for the federal government to set maximum limits on the price of alcoholic beverages for sale by the drink. The court rejected the contention, ruling that the Twenty-first Amendment does not “deprive the national government of all authority to legislate in respect of interstate commerce in intoxicants.” *Id.*, 455. The court then stated:

Followed to its logical conclusion, the appellant's construction, if valid, would mean that the federal government no longer has power to punish theft of intoxicants from interstate shipments of alcoholic beverages . . . , nor to regulate or prohibit unfair trade practices in respect to such commodities through the



*Federal Trade Commission*, nor to regulate tariffs through orders of the Interstate Commerce Commission, nor to prohibit unfair labor practices affecting commerce in intoxicants by brewers or distillers under the authority of the National Labor Relations Act, nor to prescribe minimum wages or maximum hours for employees in such enterprises under the authority of the Fair Labor Standards Act. These implications demonstrate the tenuousness of the appellant's broad contentions.

*Ibid.* (emphasis added) (citations omitted). *Accord, Taub v. Bowles*, 149 F.2d 817, 822 (Emer. Ct. App.), *cert. denied*, 326 U.S. 732 (1945). The tenuousness of petitioner's broad contentions is equally evident in this case, if attention is paid to the consequences of their adoption by this Court.

There is no powerful argument in support of reversal in this case that derives from the Twenty-first Amendment, properly understood. There are compelling reasons for upholding the full force and effect of the federal antitrust laws. In these circumstances, the correct accommodation is recognition of the prevalence of federal law.<sup>20</sup>

<sup>20</sup>Petitioner cites *Castlewood Int'l Corp. v. Simon*, 596 F.2d 638 (1979), in which a panel of the Fifth Circuit recently invalidated a federal alcoholic beverage regulation on grounds of conflict with state law and the Twenty-first Amendment. The outcome in *Castlewood* seems dubious, for many of the reasons set forth in this brief, and the case (one would assume) may be on its way to this Court. Whatever the final outcome in *Castlewood*, it is to be noted that the panel's opinion recognizes that there will be instances in which "strong federal interests" must prevail over conflicting state law, despite the Twenty-first Amendment. *Id.*, 643. The Sherman Act expresses precisely such "strong federal interests" which override the state RPM provisions in dispute.

## IV

# THE STATE ACTION DOCTRINE DOES NOT SAVE THE RPM PROVISIONS FROM INVALIDATION UNDER THE SHERMAN ACT

## A. Congress Plainly Intended The Sherman Act To Ban The RPM Activity At Issue, And Thus The State Action Doctrine Does Not Apply

This Court enunciated a "state action" exemption to the Sherman Act in *Parker v. Brown*, 317 U.S. 341 (1943). The *Parker* doctrine assumes that, in the absence of a clear congressional directive, it was not the purpose of Congress in enacting the Sherman Act to override state regulatory programs in certain circumstances. *See id.*, 350-51. The doctrine does not apply to this case, for Congress has repeatedly made clear that the Sherman Act applies with full force to RPM systems such as the one in dispute.

In *Parker*, the Court confronted a conflict between anti-competitive state laws and the expanding scope of congressional power under the Commerce Clause, and thus the expanding reach of the Sherman Act. *See, e.g., Hospital Building Co. v. Rex Hospital Trustees*, 425 U.S. 738, 743 n.2 (1976). Because the Sherman Act reaches all activities that affect commerce, and because the concept of effect on commerce has broadened over the years, state activities once deemed wholly intrastate came into collision with the pro-competitive policies of the Act. *See, e.g., City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 420-21 (1978) (Burger, C. J., concurring). Relying on federalism concepts, the Court in *Parker* concluded that Congress did not intend the Sherman Act to restrain the California regulatory program at issue in that case. 317 U.S. at 350-52. Simultaneously, the Court assumed that Congress could exercise its Commerce Clause powers to strike down the program under scrutiny. *Id.*, 350.

In most areas of Sherman Act coverage, the 1890 "intent" discussed by the Court in *Parker* remains the final expres-

sion of congressional purpose. As to resale price maintenance, however, Congress on several occasions has made quite clear that state RPM laws are precluded by the Sherman Act unless within the scope of an express congressional exemption. For example, the enactment of the Miller-Tydings Act in 1937, 50 Stat. 693, demonstrates Congress' recognition that state fair trade statutes cannot survive the Sherman Act absent specific congressional authorization. *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 607 (1976) (Blackmun, J., concurring); *id.*, 638-39 (Stewart, J., dissenting). At the present time, and at all times during this litigation and the events leading up to it, no congressional exemption from the Sherman Act for the RPM provisions at issue was in effect.

In *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951), the Court addressed a claim that a "non-signer" provision in a state fair trade statute was exempt from the Sherman Act's prohibition of vertical price fixing by virtue of the Miller-Tydings Act. Under certain conditions, Miller-Tydings exempted contracts authorized by state law. The terms of the Act did not, however, permit states to require non-signing retailers to adhere to the terms of fair trade contracts signed by other retailers.

Accordingly, the Court concluded that Congress had not intended to exempt the state statute at issue and thus the statute was invalid. In other words, Congress had determined that RPM authorized or compelled by state law could survive only if exempted by express congressional mandate, and no such mandate was applicable.<sup>30</sup> *Cf. Norman's on the*

<sup>30</sup>Petitioner suggests that *Schwegmann* involved a statute under which the state merely authorized rather than compelled conduct inconsistent with the Sherman Act. Pet. Br. 46. This is incorrect. In *Schwegmann*, the Court pointed out that the non-signer provision involved compulsion. 341 U.S. at 389. See *Cantor*, *supra*, 428 U.S. at 593 n.30; *id.*, 609 (Blackmun, J., concurring); *id.*, 639 (Stewart, J., dissenting). See also 1 P. Areeda & D. Turner, Antitrust Law

*Waterfront, Inc. v. Wheatley*, 444 F.2d 1011, 1016 (3d Cir. 1971) (invalidating Virgin Islands statute requiring resale price maintenance as not authorized by Miller-Tydings and McGuire Acts). Accordingly, *Parker v. Brown* did not apply.

In the aftermath of *Schwegmann*, Congress again addressed the need to exempt state RPM statutes from federal law if such statutes were to be valid. The congressional response was the McGuire Act, 66 Stat. 632 (1952), which authorized certain state non-signer statutes.

In the twenty years following passage of the McGuire Act, § 1 of the Sherman Act was thus narrowed by specific congressional exemptions authorizing the states to impose certain types of restraints recognized by Congress to be otherwise invalid. In 1975, however, Congress repealed the federal fair trade exemptions from the antitrust laws. The post-1890 balance between state and federal law has thus been restored by Congress, and, entirely apart from state action questions involved in other contexts, Congress has reaffirmed that state RPM laws are invalidated by the Sherman Act. Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 (1975). Accordingly, congressional intent is plain, and the *Parker v. Brown* doctrine is inapplicable.

#### **B. Even if the Parker Doctrine Applies to this Case, the RPM Provisions Do Not Meet the Doctrine's Requirements**

In *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), the Court undertook its first significant examination of the scope of the state action doctrine since *Parker*. *Goldfarb* established that the "threshold inquiry" for the *Parker* exemption is whether the activity in question "is required

¶ 209 at 61, ¶ 215 at 94 (1978). Thus, whatever relevance state compulsion versus authorization otherwise may have in the *Parker* context, the fact of compulsion does not exempt state RPM laws from the Sherman Act.



by the State acting as sovereign." 421 U.S. at 790. Application of the threshold test was sufficient to resolve the *Goldfarb* dispute, as the price fixing involved in that case had not been compelled by the state. *Ibid.*

In subsequent cases the Court has amplified the *Parker* doctrine and established that state "compulsion" alone will not lead to antitrust immunity. Other elements are necessary in order to obviate the effect of the Sherman Act. Not all of those elements are present here.

**1. THE PARKER DOCTRINE IS NOT SATISFIED BECAUSE OF THE STATE'S FAILURE TO SUPERVISE THE PRICES SET BY PRIVATE PARTIES**

In *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), the Court faced a Sherman Act challenge to a rule of the Arizona Supreme Court forbidding attorney advertising. The Court held the rule invalid on free speech grounds, but held it immune from the antitrust laws under *Parker*.

On the Sherman Act question, the Court emphasized that the state rule represented the clear command of the state supreme court, the state body empowered to exercise the state's power over the practice of law. The Court also pointed out that its concern that federal policy may be unnecessarily subordinated to state interests was reduced, because the challenged restraint was "subject to pointed re-examination" and actively supervised by the state. *Id.*, 359-62. Cf. P. Areeda & D. Turner, *supra*, ¶¶ 211, 213, 214; *The Supreme Court, 1975 Term*, 90 Harv. L. Rev. 56, 237 (1976).

The Court's opinion in *Bates* thus recognizes a number of requirements beyond mere state compulsion which must be met under the *Parker* doctrine. Of particular importance here is the requirement that the state undertake active supervision of the anticompetitive activity, for "compulsion alone—in the absence of genuine supervision—does

not prevent preemption." P. Areeda & D. Turner, *supra*, ¶ 209 at 61. See, e.g., Handler, *Twenty-Fourth Annual Antitrust Review*, 72 Colum. L. Rev. 1, 9 (1972). Under the California wine RPM provisions, there is no supervision whatsoever of the prices set by private parties. Indeed, as the highest state court recognized in *Corsetti* as a matter of state law, the ABC has no power to approve, modify, set, or re-examine prices. *Rice v. ABC Appeals Board*, *supra*, Pet. App. C at 10. The state takes no steps to determine whether the prices that are fixed advance the purported goals of the statutes or, perhaps more importantly, whether federal policies are unnecessarily thwarted. The system provides no mechanism at all by which the state itself determines whether the privately set prices are in the public interest. It simply attempts to negate the Sherman Act.

*Parker* itself was a case of extensive state supervision; detailed procedures were provided to insure that particular programs would be in the public interest. See *Cantor*, *supra*, 428 U.S. at 613 n.5 (Blackmun, J., concurring). Under the statutes in issue in *Parker*, the California Director of Agriculture was allowed to grant a request for the establishment of a prorate program only after holding a public hearing and making findings that institution of a prorate program in a given area would "prevent agricultural waste and conserve agricultural wealth of the state without permitting unreasonable profits to producers." *Parker*, *supra*, 317 U.S. at 346. After approval of the proposal, the Director established a program committee to formulate a proration program for the marketing area in question. Individual program proposals were submitted to the Agricultural Prorate Advisory Commission, composed of the Director of Agriculture and eight others appointed by the governor and confirmed by the state Senate. The Commission could then approve the program, after holding a public hearing and making a finding that



"the program is reasonably calculated to carry out the objectives of [the] act." *Id.*, 317 U.S. at 346-47. The prorate program thus required specific economic findings at each critical stage, and it involved direct approval by a state body of the precise restraint to be imposed. The price maintenance program involved in this case is the exact opposite.

The RPM provisions at issue purportedly rest on generalized economic hypotheses which were found by the ABC Appeals Board in *Corsetti* to be invalid. Memo. App. A at 14-23. There is no particularized focus on the need for price restraints in a given area or at a given time to serve those hypotheses, and the state undertakes no evaluation of the particular restraints imposed. Thus, rather than the extensive degree of state involvement present in *Parker*, the RPM provisions involve nothing more than a *carte blanche* authorization for unsupervised price fixing, with the ABC disabled from giving any heed to whether the resultant prices actually advance the purported state goals.

The fact that price restraints are involved demonstrates in particular why the absolute absence of state supervision is fatal to the RPM provisions. Preservation of price competition is the fundamental goal of the Sherman Act. In this area, more than all others, there is thus a need for some type of substitute when ordinary principles are rejected. Under the statutes involved in this case, however, the state not only removes the normal play of competitive forces, but installs nothing which will take the place of competition in insuring that the public interest is attained. No responsible concept of federalism suggests in any way that the state should be allowed to trample on fundamental federal interests without providing some state mechanism as a substitute for competition in protecting the public interest. See, e.g., Posner, *The Proper Relationship Be-*

*tween State Regulation and the Federal Antitrust Laws*, 49 N.Y.U. L. Rev. 693, 714-15 (1974).

The Court has recognized the critical distinction between state regulation of prices and state authorization to private parties to set prices. *Schwegmann Bros. v. Calvert Distillers Corp.*, *supra*, is one example of a case in which this Court refused to countenance unregulated private price fixing, even though the pricing conduct in question was required by state law. In *United States v. South-eastern Underwriters Ass'n*, 322 U.S. 533 (1944), the Court also recognized the distinction between state regulation of price and state authorization of private price fixing. In *South-eastern Underwriters*, the Court held the business of insurance to be "commerce" within the meaning of the Sherman Act. In response to the contention that this result would invalidate innumerable state insurance laws, the Court distinguished state authorization of unrestrained private price fixing from situations such as that in *Parker* where the state actively participated in establishing price levels, suggesting that only the former would be invalid. *Id.*, 562. See also *Norman's on the Waterfront, Inc. v. Wheatley*, 444 F.2d 1011, 1018 (3d Cir. 1971) (*Parker* exemption for Virgin Islands liquor price maintenance scheme denied partly on the ground that the governmental agency in question had no authority over price levels). Because it fails to provide a surrogate guardian for the public interest in place of unfettered price competition, the wine RPM system at issue does not qualify for exemption under the *Parker* doctrine.<sup>31</sup>

<sup>31</sup>The supervision requirement of the *Parker* doctrine distinguishes *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96 (1978) from the present case. *New Motor Vehicle Bd.* involved the California Automobile Franchise Act. The Act allowed for temporary delays in the establishment of new automobile dealerships, at the behest of private parties, but the state agency did not, as does the ABC in this case, serve merely as a rubber stamp for private conduct. As the Court noted in *New Motor Vehicle Bd.*, of 117 protests filed by allegedly aggrieved auto dealers, "only one ever

**2. THE RPM PROVISIONS ARE NOT NECESSARY TO THE SUCCESS OF THE STATE'S REGULATORY SYSTEM AND THEREFORE DO NOT QUALIFY FOR A PARKER EXEMPTION**

In *Cantor, supra*, a majority of the Court applied the test used to determine whether federal regulation leads to implied antitrust immunity to the state action question. 428 U.S. at 592-98. Under this approach, implied immunity will be found only when the restraint in question is so central to the regulatory system involved that exemption is necessary to make the system work. *See, e.g., id.*, 598. Under this test, the wine RPM provisions must fall.

The AG acknowledges *Cantor's* adoption of implied immunity standards, and blithely asserts that they are met. AG Br. 17. Not surprisingly, the AG does not explain how the RPM provisions are central to the success of regulation of alcoholic beverages in the state. Such an attempt would be doomed to failure.

There is no presently operative RPM system for distilled spirits in California, and the state has dropped enforcement of wine RPM, at least at the retail level. Yet neither the AG nor petitioner can point to any havoc in the California alcoholic beverage industry nor to any indication that the state has lost control over its licensees as a result of the demise of RPM. The ABC Director's public statements, see n.14, *supra*, and his decision not to seek reversal in this case belie any notion that the constitutionally-empowered state agency regards RPM as necessary to its ability to regulate licensees. Obviously, resale price maintenance, especially in the baldly unsupervised and anticompetitive form presented here, is not "necessary" to the state's regulation of alcoholic beverages.

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matured into a permanent injunction" against the establishment of a new dealership. *Id.*, 110 n.14. Thus, unlike the present case, the state agency actively evaluated the effect of the private conduct in question.

**3. THE HARMS RESULTING FROM CALIFORNIA'S RPM SCHEME OUTWEIGH THE BENEFITS, AND A PARKER EXEMPTION IS THEREFORE INAPPROPRIATE**

In his *Cantor* concurrence, Mr. Justice Blackmun advocated a "rule of reason" test for determining whether "state-sanctioned anticompetitive activity" should be entitled to an exemption under *Parker*. *Cantor, supra*, 428 U.S. at 610-12. Under such an approach, the resale price maintenance scheme at issue is invalid.

This case does not present state regulatory conduct which is minimally or peripherally in conflict with federal antitrust laws. *Cf. New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96 (1978); *Exxon v. Governor of Maryland*, 437 U.S. 117 (1978). The system squarely conflicts with the Sherman Act. Yet the interference with fundamental federal policy produced by the system cannot be justified by reference to any state benefits allegedly obtained. As the ABC Appeals Board found in *Corsetti*, Memo App. A, the RPM system does not produce the benefits it is supposedly intended to achieve.

No doubt the goal of promoting temperance represents a significant state interest. But, as the Appeals Board found, RPM is a failure at promoting temperance. Moreover, the RPM system does not even require that prices be set at a temperance promoting level (assuming that price has any relationship to temperance). Under the system, prices may be set as high or as low as desired by producers. Thus, it is difficult to discern the state benefit that is to be measured against the federal interest. In any event, there are other methods, far less destructive of federal interests, available to the state to promote the goal of temperance and achieve the other purported aim of the system, order in the distribution of alcoholic beverages.

In the area of economic regulation, the state is free to, as it has, prohibit predatory practices which may contrib-

ute to disorder in the marketing of alcoholic beverages. State laws prohibiting the use of loss leaders, Cal. Bus. & Prof. Code § 17044, below-cost pricing, Cal. Bus. & Prof. Code § 17043, locality discrimination, Cal. Bus. & Prof. Code § 17040, and similar provisions, preserve order in the marketing of alcoholic beverages in a manner consistent with the federal antitrust laws. California has these and other ample methods available to promote order without abandoning federal interests to the whim of private interests. However, the state has not limited its efforts to promote order to regulation consistent with federal law; it has instead adopted the RPM scheme in issue which directly conflicts with the fundamental federal interests expressed in the Sherman Act. The assault on the competitive dictates of the antitrust laws cannot be justified as the RPM system has failed to obtain countervailing state benefits which might support displacement of the predominant federal policies. Accordingly, the RPM system is not entitled to a *Parker* exemption.

### CONCLUSION

In the Sherman Act, "Congress, exercising the full extent of its constitutional power, sought to establish a regime of competition as the fundamental principle governing commerce in this country." *City of Lafayette, supra*, 435 U.S. at 398. As this Court stated in *United States v. Topco Assoc.*, 405 U.S. 596, 610 (1972):

Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.

The judgment below fully accords with the fundamental federal interests at stake and reaches the correct accommodation of the state and federal concerns represented by the constitutional provisions at stake. For these and the other reasons set forth in this brief, the judgment below should be affirmed.

Respectfully submitted,

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Supreme Court, U.S.  
FILED

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In the Supreme Court MICHAEL RODAK, JR., CLERK

OF THE

United States

OCTOBER TERM, 1979

No. 79-97

CALIFORNIA RETAIL LIQUOR DEALERS ASSOCIATION,  
a California corporation,  
*Petitioner*

vs.

MIDCAL ALUMINUM, INC., a California corporation,  
*Respondent*

BAXTER RICE as Director of the Department of Alcoholic  
Beverage Control of the State of California,  
*Respondent*

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**PETITIONER'S REPLY BRIEF**

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## SUBJECT INDEX

Page

### I

Summary of petitioner's argument in reply ..... 1

### II

No other California court has ruled on the factual issues or the wholesale to retail provisions of the regulatory provisions involved in the accusation against Midcal in this case; the decision of this court will have an immediate and direct impact on all the parties and the case is in no way moot as contended by Midcal ..... 12

### III

Contrary to Midcal's contentions petitioner raised the effect of the Webb-Kenyon Act below and before this court in its petition for writ of certiorari and it is reasonably and necessarily included in the questions presented to this court ..... 32

### IV

This court should not now limit a state's legislative power but should reaffirm the doctrine that has been applied continuously since the ratification of the Twenty-first Amendment that when a state acts to regulate liquor, within its borders, it is "unfettered by the commerce clause" and that the Twenty-first Amendment reverses the normal federal-state roles under the commerce clause ..... 34

A. The contention, presently being made by Midcal, that the Twenty-first Amendment simply grants power to a state to prohibit or restrict the importation of liquor into the state is contrary to the rulings of this court and is patently and historically without merit ..... 34

B. None of the authorities cited by Midcal stand for the proposition that the Twenty-first amendment simply allows a state to prohibit or restrict the importation of liquor into a state; this court has never so held ..... 36

C. Contrary to the contention of the solicitor general in this case, once a state has exercised its legislative power under the Twenty-first Amendment and enacted provisions regulating the sale of liquor within its borders, which have no significant extra-territorial effect, Congress is without power, under the commerce clause, to preempt the state legislation ..... 39

## SUBJECT INDEX

	<u>Page</u>
D. The only decision of this court cited by the solicitor general to support his contention that Congressional acts preempt state liquor regulation within the boundaries of a state involved a federal regulatory provision prohibiting the importation into the United States of improperly labeled Scotch whiskey; there was no state law involved	41
E. The limited concept of what constituted inter-state commerce, as enumerated by this court, at the time of the ratification of the Twenty-first Amendment in 1933 made unnecessary any language in Section 2 specifically covering the regulation of liquor within the states' borders since the states already possessed that power	47
F. None of the cases of this court cited by either Midcal or the United States support their positions and the arguments of both should be rejected	52
V	
The conduct of the wine producers in this case is not "privately initiated" but is compelled by the state legislature and its determination as to the method by which the purposes of the comprehensive legislative scheme will be accomplished is properly left to the legislature and the statutory provisions are exempt from the Sherman Act under the "state action" doctrine	54
VI	
Conclusion	64

## TABLE OF AUTHORITIES CITED

<u>CASES</u>	<u>Page</u>
Bates v. State Bar of Arizona	63
Bernhard v. Bank of America, 19 Cal.2d 807	21, 22, 23, 25, 26
Bleeck v. State Board of Optometry (1971) 18 Cal.App.3d 415	25
Blonder-Tongue Lab., Inc. v. University of Illinois Found. (1971) 402 U.S. 319	33, 34
Burke v. Ford, 389 U.S. 320 (1967)	52, 53
California v. La Rue (1972) 409 U.S. 109	36, 38, 52
California Optometric Assn. v. Lackner, 60 Cal.App.3d 500, 131 Cal.Rptr. 744 (1976)	21
Cantor v. Detroit Edison Co., 428 U.S. 579	57, 64
Castlewood Intern. Corp. v. Simon, 596 F.2d 638 (5th Cir., 1979)	10, 11, 42, 43
Chern v. Bank of America, 15 Cal.3d 866	21, 23, 24
City of Los Angeles v. City of San Fernando, 14 Cal.3d 199	21, 23
Cochran v. Union Lumber Co. (1972) 26 Cal.App.3d 427	25
Collins v. Yosemite Park & Curry Co., 304 U.S. 518	6, 37
Craig v. Boren (1976) 429 U.S. 190	6, 33, 38, 41
Department of Revenue v. James B. Beam Distilling Co. (1964) 377 U.S. 341	42
Farmers Markets, Inc. v. Baxter Rice, 3 Civil 18743	18
Ferrigno v. Alcoholic Beverage Appeals Board, 1 Civil No. 47118	58
Goldfarb v. Virginia State Bar (1975) 421 U.S. 773	45, 46
Heublein, Inc. v. So. Car. Tax Comm'n. (1972) 409 U.S. 275	21, 22
Hollywood Circle, Inc. v. Department of ABC, 55 Cal.2d 728	6, 42
Hostetter v. Idlewild Liquor Corp., 377 U.S. 324	41, 42
Jamison & Co. v. Morgenthau (1939) 307 U.S. 171	52
Jatros v. Bowles, 143 F.2d 453 (1944)	38
Kraus v. Sacramento Inn (1970) 314 F.Supp. 171	49
Labor Board v. Jones & Laughlin (1936) 301 U.S. 1	57, 64
Lafayette v. Louisiana Power & Light Co. (1978) 435 U.S. 389	36, 38
Lamp Liquors, Inc. v. Adolph Coors Co. (1977) 563 F.2d 425	



## TABLE OF AUTHORITIES CITED

CASES	Page
Low's Stores, Inc. v. Department of Alcoholic Beverage Control (1962) 57 Cal.2d 749	24, 25
Marbury v. Madison (1803) 5 U.S. 137	52
Mobilfone v. Commonwealth Telephone Co. (1978) 571 F.2d 141	63
National Railroad Passenger Corp. v. Miller (1973) 358 F.Supp. 1321, aff'd 414 U.S. 948	11, 38, 43
Nebbia v. People of the State of New York (1934) 291 U.S. 502	62
New Motor Vehicles Bd. of Cal. v. Orrin W. Fox Co. (1978) 439 U.S. 96	59, 60, 64
Norman Williams Company, etc., et al. v. Baxter Rice, 3 Civil 19089	28
Norman's on the Waterfront, Inc. v. Wheatley, 18	44
North Carolina v. Rice (1971) 404 U.S. 244	17
Old Dearborn Co. v. Seagram Corp. (1936) 299 U.S. 183	50
Parker v. Brown (1943) 317 U.S. 341	55, 58, 63
Preiser v. Newkirk (1975) 422 U.S. 395	17, 18
Princeton Community Phone Book, Inc. v. Bate (1978) 582 F.2d 706	63
Sail'er Inn, Inc. v. Kirby, Director of ABC (1971) 5 Cal.3d 1	36, 38
Schechter Poultry Corp. v. United States (1935) 295 U.S. 495	49
Seaboard Air Line Ry. v. North Carolina (1917) 245 U.S. 298	43
Seagram & Sons v. Hostetter, 384 U.S. 35	16
Six Companies v. Highway District (1940) 311 U.S. 180	19
State Board v. Young's Market Co., 299 U.S. 59	36
Swift & Co. v. United States (1905) 196 U.S. 375	49
United States v. Butler (1935) 297 U.S. 1	52
United States v. E. C. Knight Co. (1895) 156 U.S. 1	50
U.S. v. Frankfort Distilleries, 324 U.S. 293	6, 9, 43, 51, 53
United States v. Stone & Downer Co., 274 U.S. 225	25
United States v. Tax Comm'n of Miss. (1973) 412 U.S. 363	36, 37
Wisconsin v. Constantineau, 400 U.S. 433	6
Wright v. U.S. (1938) 302 U.S. 583	52
Ziffrin, Inc. v. Reeves (1939) 308 U.S. 132	38

## TABLE OF AUTHORITIES CITED

Constitutions	Page
California Constitution, Article XX, Section 22	31
United States Constitution:	
First Amendment	53
Fourteenth Amendment	53
Twenty-first Amendment	passim
<b>Rules</b>	
4 California Administrative Code, Rule 101	16, 17
United States Supreme Court Rules, Rule 23.1(c)	34
<b>Statutes</b>	
California Code of Civil Procedure, Section 387	13
Alcoholic Beverage Control Act (California Business & Professions Code):	
Section 23001	25
Section 24755	28, 30
Section 24756	18, 27
Section 24862	16, 17, 18, 28, 61
Section 24866	16, 17, 18, 28, 61
Section 24866(b)	27
Section 24867	27
Section 25000	18, 27
Emergency Price Control Act	52
Federal Alcohol Administration Act (27 U.S.C. 201 et seq.)	11, 41
Federal Civil Rights Act	38
McGuire Act (66 Stat. 632)	10, 54, 55
Miller-Tydings Act (50 Stat. 693)	41, 50, 54, 55
Organic Act	44
Rail Passenger Service Act (45 U.S.C. Section 501 et seq.)	10
Act to Regulate Commerce (36 Stat. 539)	43
Sherman Antitrust Act	7, 18, 34, 35, 39, 43, 49, 50, 53, 54, 55, 58, 62
Webb-Kenyon Act	5, 10, 32, 33, 34, 36, 42, 43, 44, 47, 48, 50
Wilson Act	5, 9, 33, 44, 47
1975 Cal. Stats., Ch. 402	29
<b>Other Authorities</b>	
Chapter 153 of the 1979 Session Laws of Kansas, House Bill 2020	28
H. R. Rep. No. 94-341, 94th Cong., First Sess., p. 3, n.2 (1975)	55
S.R. Rep. No. 446, 94th Cong., First Sess., p. 2 (1975)	55
Restatement of Judgments, Section 70	24

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BAXTER RICE as Director of the Department of Alcoholic  
Beverage Control of the State of California,  
*Respondent*

## PETITIONER'S REPLY BRIEF

I

### SUMMARY OF PETITIONER'S ARGUMENT IN REPLY

The wholesale distributor for Gallo Wine in southern California, an affiliate of the wine producer Gallo Wine Company, referred to as Midcal throughout this proceeding, in urging this Court to reconsider its order allowing the California Attorney General to file an amicus curiae brief and present oral argument, raised a "suggestion of mootness." In ruling on that motion, this Court deferred the "suggestion of mootness" . . . "to the hearing of the case on the merits. . . ."

Midcal contends that a California Court of Appeal case, *Capiscean*, (Pet. for Cert., Ex. D), declared the regulatory

provisions directly involved in this review to be invalid at both the wholesale to retail and retail to consumer level. It then argues that since the Department was a party to that case, and the case has become final, the Department is "collaterally estopped" from defending this case and thus, so Midcal's reasoning goes, the matter is now "moot".

Factually, the *Capiscean* case involved only retail to consumer wine minimum prices, whereas the instant case involves factually only wholesale to retail minimum wine prices, and thus there is no basis for Midcal's argument. Furthermore, under California law, a public official cannot be "collaterally estopped" from enforcing a state statute of the nature involved in this proceeding.

Midcal did not raise any such question in the court below. Neither did it raise this question in its Brief in Opposition to the Petition for Certiorari before this Court.

In the same vein, Midcal also apparently argues that there is no enforcement in California of the wholesale to retail wine minimum prices, and suggests that therefore any decision by this Court would be merely an "advisory opinion." This contention is likewise without merit.

This proceeding commenced in California by an accusation against Midcal charging it with violating the wine minimum price provisions involved in this case in two respects:

- (1) Selling wine to retailers where no price had been posted with the Department, and
- (2) Selling wine to a retailer at prices below the prices posted with the Department.

Midcal stipulated to the facts and accepted the imposition of a penalty subject to a "judicial determination." Thereafter, Midcal filed an original proceeding in the Court of Appeal, seeking an interpretation of the validity of the provisions involved under the *Rice (Corsetti)* case, and seeking to restrain the Department from enforcing the provisions.

Petitioner sought leave to intervene based on the fact that a declaration of invalidity of these provisions would directly affect the interests of its members in being protected against discrimination by wholesalers and unfair competition by other retailers. The intervention was granted and the Petitioner became a party to the proceedings.

The Court of Appeal, feeling itself bound to follow the *Rice (Corsetti)* decision of the California Supreme Court, declared the provisions invalid. A petition for rehearing was denied before that court, and a petition for hearing was denied by the California Supreme Court.

Thereafter, a Petition for Writ of Certiorari was sought from this Court by the Petitioner. After the Petition was granted by this Court, the Department at first determined to participate in the proceeding, and then determined to remain "neutral" feeling itself bound by the decision of the "highest court of the state" [*Rice (Corsetti)*]. However, the Department did state to this Court that it "would comply fully" with the decision of this Court.

Although the Court of Appeal decision ordered the issuance of a peremptory writ of mandate directing the Department to cease enforcement of the provisions involved,



it nevertheless granted a stay of its decision pending a review by this Court.

In the meantime, the Department has continued to enforce the wholesale to retail price posting provisions for wine that are involved in this litigation, although apparently enforcement of the minimum retail to consumer prices for wine has ceased pursuant to the *Capiscean* decision.

Assuming that the decision of this Court upholds the validity of the California regulatory provisions, a reversal of the instant case will result in the California Court of Appeal reversing its order to the Department to cease enforcement, and will cause the penalty to be imposed upon Midcal for its violation of the California law. Thus the decision of this Court in this case will not be an "advisory opinion."

Midcal also argues that the California Legislature has "refused" to enact any liquor price provisions and therefore apparently would ask this Court to conclude that California has somehow abandoned its regulation of prices for liquor. This contention is likewise in error. The Legislature has not repealed the two wine statutes involved directly in this litigation, nor has it repealed the minimum price statute relating to distilled spirits directly involved in the *Rice (Corsetti)* case. Furthermore, contrary to Midcal's assertions, the Legislature has taken no action on any statutory provisions relating to price in the liquor field.

There are also some allusions to the position of the California Governor. There appears to be no support in

any of the materials before this Court, whether they be properly within the record or otherwise, for any position of the Governor, even if that were relevant. Consequently, no comment would seem to be required in that respect.

In summary, there is no merit to Midcal's argument regarding a "collateral estoppel" or a "suggestion of mootness" and it should be rejected.

A discussion of the Wilson and Webb-Kenyon Acts is said by Midcal to not be properly before this Court based on its contention that these Acts were not "properly" presented in the Court below, and that such consideration is not included in the "Questions Presented" to this Court. Suffice it to say that Petitioner did in fact discuss the Webb-Kenyon Act in the court below and did in fact include references to the Wilson and Webb-Kenyon Acts in three different places in its Petition for Certiorari herein.

Although it is true that in the "Questions Presented" the Wilson and Webb-Kenyon Acts were not specifically referred to, it would seem that a discussion of the legislative enactments relating to the inter-relationship of the federal and state governments with regard to the regulation of liquor which predated and led up to the ratification of the Twenty-first Amendment would be reasonably included in a discussion as to the effect to be given to the Twenty-first Amendment. This would seem to be especially true when the Webb-Kenyon Act is said to have been "constitutionalized" by the Twenty-first Amendment. Additionally, although the point would seem to be irrelevant in view of the facts, this Court, on its own motion, could allow such a consideration. It is likewise urged that this contention of

Midcal be rejected and that this Court do in fact consider all necessary factors in order to reach the proper decision in this case.

In its Opening Brief, Petitioner discussed the various cases of this Court, and several others, which have clearly outlined the power of the states to regulate liquor within their borders "unfettered by the Commerce Clause" and presented an analysis, albeit not original, of the several areas where the states' power to regulate liquor under the Commerce Clause has been limited. Petitioner discussed the due process and equal protection exceptions illustrated by *Craig v. Boren*, 429 U.S. 190, and *Wisconsin v. Constantineau*, 400 U.S. 433; Petitioner discussed cases which dealt with extra-territorial effects of state liquor regulatory provisions, such as *U.S. v. Frankfort Distilleries*, 324 U.S. 293, and *Seagram & Sons v. Hostetter*, 384 U.S. 35; Petitioner likewise dealt with questions of foreign commerce as illustrated by the case of *Hostetter v. Idlewild Liquor Corp.*, 377 U.S. 324; Petitioner also discussed the exception relating to federal enclaves and military installations as illustrated by the case of *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518.

Petitioner pointed out that the California Supreme Court in *Rice (Corsetti)* had misinterpreted the various cases and had mistaken the exceptions where other constitutional provisions were involved and where foreign commerce was involved as somehow limiting the state when the regulatory provision involved only a potential conflict with the Commerce Clause itself. Out of this misconception by the California Supreme Court as to the effect of these

exception cases, the California Supreme Court evolved a "balancing of the interests" rule to be applied to apparently all state regulatory provisions regarding liquor within a state's borders where anti-competitive behavior under a state statute is compelled. The test evolved by the California Supreme Court is patently without support by any precedent of this Court, is a substitution of the wisdom of the court for that of the Legislature, would require that the interpretation of the scope of the Twenty-first Amendment proceed on a case-by-case basis, and all in all would present an unworkable situation.

Both Midcal and the United States seemingly approve the rationale of the *Rice (Corsetti)* case, but apparently recognizing its invalidity under the cases decided by this Court, do not attempt to support it by, for instance, disputing Petitioner's position as to the meaning of the phrase "unfettered by the Commerce Clause" and the proper analysis of the several cases that have in fact restricted the state's power under the Twenty-first Amendment because of potential conflict with other sections of the Constitution.

Now, for the first time, Midcal argues for what it deems to be a literal interpretation of § 2 of the Twenty-first Amendment. It argues that under that Amendment the states only have the power to regulate liquor in connection with its importation and in that regard may only either prohibit it altogether or place restrictions on its importation. It is not clear from reading Midcal's Brief what power, if any, the state has beyond this control over importation, the only clear contention being that any state regulatory provision relating to liquor within the state's border that conflicts with the Sherman Act is invalid. Mid-

cal is unable to cite any authority in the form of decisions of this Court to support this new interpretation of the Twenty-first Amendment. Indeed, to the best of Petitioner's knowledge, there are none. There are, in fact, a number of decisions of this Court in which state regulatory provisions relating to liquor within the borders of a state have been upheld as valid enactments under the Twenty-first Amendment.

The United States likewise urges a new approach to the interpretation of the Twenty-first Amendment, but unlike Midcal would remove any vestige of meaning from that Amendment by having this Court interpret a state regulatory provision enacted pursuant to the Twenty-first Amendment to be subject to the Supremacy Clause, and thus any Act of Congress under the Commerce Clause would "pre-empt" it. The United States cites no authority for the proposition that the Supremacy Clause subordinates the Twenty-first Amendment to the Commerce Clause, nor indeed is there any. The contention is without merit.

The Supremacy Clause itself contains the answer to that contention in its very language where it provides that the "Constitution . . . shall be the supreme law of the land . . ." Since the Twenty-first Amendment is a part of the Constitution, and since state regulatory provisions enacted pursuant to the Twenty-first Amendment have been held to be "unfettered by the Commerce Clause", it is illogical to argue that any congressional enactment under the Commerce Clause would "pre-empt" a state statute enacted under the other equal constitutional provision, namely, the

Twenty-first Amendment. Indeed, as Justice Frankfurter said in his concurring opinion in *U.S. v. Frankfort Distilleries*, supra:

" . . . before a federal law may preempt state legislation, the federal statute must be free from constitutional infirmity. Constitutional amendments limit the power of Congress as well as that of the states when so considered . . ."

As Justice Frankfurter also pointed out, in that same concurring opinion in the *Frankfort Distilleries* case:

" . . . Since the Commerce Clause is subordinate to the exercise of State power under the Twenty-first Amendment, the Sherman law, deriving its authority from the Commerce Clause, can have no greater potency than the Commerce Clause itself. It must equally yield to State power drawn from the Twenty-first Amendment. And so, the validity of a charge under the Sherman law relating to intoxicating liquors depends upon the utilization by a State of its constitutional power under the Twenty-first Amendment . . ."

On the question of congressional intent, it appears that rather than restrict the states' powers to regulate liquor within their borders and indeed even liquor in interstate commerce, Congress has not attempted to restrict the power, but rather has expanded it. When the Supreme Court, prior to the adoption of the Wilson Act, held that the Commerce Clause gave Congress broader powers than had been recognized in *The License Cases*, Congress attempted to restore that power to the states. Later, when the power of the states was again deemed to have been threatened by decisions of this Court interpreting the Wil-



son Act, Congress again restricted its own powers under the Commerce Clause by enacting the Webb-Kenyon Act, an Act which has been held to have taken intoxicating liquor "out of interstate commerce." Again, in adopting the resolution which became the Twenty-first Amendment, Congress was a party to "constitutionalizing" the restriction on its power under the Commerce Clause to enact legislation affecting liquor where the state acted pursuant to the Twenty-first Amendment.

The most recent and clear statement of legislative intent involving the question before this Court, and one which would seem to be entitled to more weight than speeches by Senators debating a Senate resolution, is the Report of the Senate Judiciary Committee at the time the Miller-Tydings and McGuire Acts were repealed by Congress in 1975:

"... Thus, while repeal of the fair trade laws generally will prohibit manufacturers from enforcing resale prices, alcohol manufacturers may do so in States which pass price fixing statutes pursuant to the Twenty-first Amendment."

In addition to the lack of congressional intent to preempt state regulatory provisions controlling liquor within a state's borders, the *National Railroad Passenger Corp.* case, (358 F.Supp. 1321, aff'd 414 U.S. 948), and the *Castlewood* case, (596 F.2d 638, 5th Cir.), are examples of where the court avoided a conflict between federal and state law, as in the *National Railroad Passenger Corp.* case, (holding that if the Railroad Passenger Act allowed the service of alcoholic beverages by the drink in Kansas that it would be an unconstitutional statute since it conflicted with the

prohibition enacted by the state of Kansas to serving alcohol by the drink under the Twenty-first Amendment) and in *Castlewood Corp.*, where a regulation of the Bureau of Alcohol, Tobacco & Firearms, the federal agency created by the federal Alcohol Administration Act, relating to the amount of discount to be allowed on beer (i.e., a price regulation) conflicted with a state regulatory provision relating to discounts, was therefore held to be invalid since the state regulatory provision was based upon the Twenty-first Amendment.

It is argued by Midcal and the United States that the "state action" exemption is not applicable in this case because the conduct is "privately initiated". The conduct, that is, the setting of the prices of its own brand by the wine producer at wholesale and retail, is not "initiated" by the wine producer, rather, it is required by the state statutes involved. It is further argued that the setting of the prices is not "supervised" by the state, and therefore the statutes do not qualify for the "state action" exemption. Petitioner would submit that the method by which a state seeks to promote the objectives of the regulatory provisions, whether by allowing the brand owners or producers to set the prices for their products, whether the Legislature enacts minimum markup statutes, whether minimum markup regulations are adopted by the administrative agency charged with enforcing the regulatory provisions, or whether an administrative agency itself, after hearings, sets the prices, is a matter that is best left up to the states. Petitioner would contend that so long as the conduct is required, that it is part of a comprehensive regulatory scheme

for achieving legitimate state purposes, the "state action" exemption should apply.

The California regulatory provisions involved are valid statutes enacted pursuant to the Twenty-first Amendment for achieving a valid state purpose of regulating liquor within the borders of California, and thus should be upheld by this Court, with or without considering the effects of the "state action" exemption.

## II

**NO OTHER CALIFORNIA COURT HAS RULED ON THE FACTUAL ISSUES OR THE WHOLESALE TO RETAIL PROVISIONS OF THE REGULATORY PROVISIONS INVOLVED IN THE ACCUSATION AGAINST MIDCAL IN THIS CASE; THE DECISION OF THIS COURT WILL HAVE AN IMMEDIATE AND DIRECT IMPACT ON ALL THE PARTIES AND THE CASE IS IN NO WAY MOOT AS CONTENDED BY MIDCAL**

As stated by Midcal<sup>1</sup> it filed a "mandamus petition [in the California Court of Appeal] . . . seeking a determination of the invalidity of wholesale and retail RPM."<sup>2</sup> Petitioner sought leave to intervene in the State Court of

<sup>1</sup>Midcal Brief, p. 17.

<sup>2</sup>The term "RPM" is more misleading than helpful in discussing this case. It can mean either resale price maintenance or retail price maintenance. *Resale* price maintenance can refer to either wholesale or retail prices; *retail* price maintenance refers only to retail prices. *Rice* involved only *retail* price maintenance yet both terms were used to describe that level of trade. (See Pet. for Cert., Appendix, pp. C-36, C-37.) The case before this Court factually involves violations of the wine price posting requirements at *wholesale* which have not been ruled upon by any California Appellate Court as contrasted to the *Capiscean* case which only involved price maintenance at *retail* and which did declare "retail price maintenance" for wine to be invalid. (See Pet. for Cert. Appendix D-4.) In view of the interpretation now being suggested by Midcal of the holding of the *Capiscean* case, i.e., that it applies to wholesale as well as retail, seemingly to support a meritless collateral estoppel argument, the use of the term RPM in the Midcal brief is particularly inappropriate.

Appeal which was granted by that court and Petitioner thus became a *party* to the proceeding in the court below.<sup>3</sup>

The Court of Appeal followed the California Supreme Court's decision in *Rice (Corsetti)*<sup>4</sup> and declared the state regulatory provisions invalid on solely federal grounds, i.e., that they constituted "price-fixing" in violation of the Sherman Act and pointed out that *Rice (Corsetti)* held that neither the Twenty-first Amendment nor the "state action" exemption "provide a basis for upholding" them. (Appendix A-4 and A-9, Pet. for Cert.)

Midcal, in seeking a reversal of this Court's order of November 26, 1979 granting "the motion of State of California for divided argument" allowing the California Attorney General to present ten minutes of oral argument on behalf of the State of California raised a "suggestion of mootness" and "collateral estoppel."<sup>5</sup> In the order of De-

<sup>3</sup>California Code of Civ. Proc. § 387 provides, in part, that ". . . any person, who has an interest in the matter in litigation . . . may intervene. . . ." It further provides that ". . . intervention takes place when a third person is permitted to become a party to an action. . . ."

<sup>4</sup>There is only one California Supreme Court case directly related to this review. The Court of Appeal below referred to it as "*Rice*", the *Capiscean* court referred to it as "*Rice*"; Midcal referred to it as "*Rice*" in its "Opposition to Petition for Writ of Certiorari" herein; Petitioner has consistently referred to it as "*Rice*"; Midcal, in its brief before this Court, now refers to this same case as "*Corsetti*". In order to prevent further possible confusion, Petitioner will henceforth refer to that case as "*Rice (Corsetti)*."

<sup>5</sup>Midcal's "Memorandum in Response to Motion of State Attorney General to Present Oral Argument in Support of Petitioner and Suggestion of Mootness." At pages 2 and 3 of that Memorandum Midcal states: "The memorandum further raises a suggestion of mootness, because of a previous decision by a state appellate court against the ABC on wine price maintenance statutes—a decision that was not appealed and thus became final and binding on the ABC. Because of the collateral estoppel consequences of that state



cember 10, 1979 in which Midcal's "motion for reconsideration of the order of November 26, 1979 granting divided argument" was denied, this Court also ordered that "Further consideration of Respondent's suggestion of mootness is deferred to the hearing of the case on the merits." Petitioner will now address that matter.

After petitioning for a ruling from the lower court on the solely federal questions, Midcal now, for the first time before this Court<sup>6</sup> seeks to avoid a decision reversing the lower court's decision and clarifying the uncertainty that exists in the law because of the California Supreme Court's decision in *Rice (Corsetti)* and the lower court's ruling that it was "bound by that decision." (See Pet's. Opening Brief, p. 10.)

More specifically, Midcal seeks to avoid a final "judicial determination" in this case from the only Court that has jurisdiction to render a meaningful and binding decision on the precise federal questions on which Midcal originally sought to have a "judicial determination" by the court below.

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appellate court final judgment for the ABC, the real party in interest on the issues presented, any ruling by this Court on the merits could constitute nothing more than an advisory opinion on a moot controversy." This statement by Midcal is not correct either factually or as a matter of law as will appear in Petitioner's discussion of these contentions.

<sup>6</sup>No questions of "mootness", failure to enforce, "collateral estoppel", standing of the parties or any of the other vaguely alluded to alleged procedural deficiencies were raised in the courts below by Midcal. Nor did Midcal raise any of these alleged grounds for avoiding a decision by this Court in its "Brief in Opposition to Petition for Writ of Certiorari." Failing to raise these alleged issues earlier in this proceeding is understandable—there is no basis for the contentions.

Midcal now argues that the *Capiscean* court ruled that wine wholesale price posting was invalid;<sup>7</sup> that the decision "became final"<sup>8</sup> and therefore the present review presents a "belated collateral attack" on the earlier court decisions.<sup>9</sup>

Midcal's brief also would appear to have the tendency to create an impression that the *wholesale* to retail price posting provisions for wine involved specifically in this case are not being enforced in California.<sup>10</sup> Although the particular relevance of such a circumstance, even if it existed, is not apparent, the reverse is in fact true. To demonstrate the inaccuracy of any such impression, attached as Exhibits "A", "B", and "C" to this brief, are

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<sup>7</sup>Midcal states at page 17 of its brief:

"However, the court's opinion [*Capiscean*] declares that wine RPM in California is invalid *at both the wholesale and retail levels* and the court's ruling has been so interpreted." (Emphasis added.) (Citing a recent law review comment.)

The statement is in error as Midcal itself recognizes:

"Technically speaking, the judgment in *Capiscean* may reach only wine RPM at the retail (consumer) level; the accused in the case was a retailer prosecuted only for selling below fixed minimum retail prices . . ." (Midcal Brief, p. 17.)

<sup>8</sup>Midcal Brief, pp. 16 and 17:

"The ABC did not seek review of the *Capiscean* ruling. Nor did the AG or anyone else. The ruling and judgment of the court became final. . . ."

<sup>9</sup>Midcal Brief, p. 19:

"Viewed realistically, the arguments raised in support of reversal in this case represent a belated collateral attack on state court decisions."

<sup>10</sup>Midcal Brief, p. 19:

"Moreover, the state officers with administrative authority over the statutes at issue do not seek reversal and do not endorse alcoholic beverage RPM. . . ."

" . . . the state has largely adapted to the competitive principles of the Sherman Act . . ."

" . . . It would be disruptive, if not impractical, to attempt to reverse that course at this late date and to *reimpose RPM on state officers* who do not want it . . ." (Emphasis added.)



three accusations filed against California wholesale licensees for violating the same wine wholesale to retail provisions of the Act as those which Midcal admits violating.<sup>11</sup> The fact that the lower California court stayed the effectiveness of its decision declaring the provisions invalid "until further order of the court" is also significant in that regard. (See Jt. Appen., p. 54.)

California law on the question of collateral estoppel, since it is not even factually involved, as discussed later, is irrelevant. (Since Midcal contends for a *legal* interpretation of collateral estoppel that is not supported by California law Petitioner will also discuss collateral estoppel later in this section.) However, there could be no collateral estoppel in this case in any event since the question of the validity of the regulatory provisions requiring the posting of the price of wine from wholesale to retail have not been challenged or decided by any California case except the instant one now before this Court. A brief discussion of the facts of this case eliminates any confusion about the *wholesale* price posting basis of the instant case.

The facts of this case are simple. The Department filed an accusation against the southern California Gallo Wine affiliate, Midcal Aluminum, Inc., (dba Gallo Wine Company—see Exhibit C, Jt. Appen.) which occupies a dominant position in the southern California wine market. (See declaration of Mandella, Jt. Appen. 39.) The accusation charged a violation of the wholesale to retail provisions of §§ 24862 and 24866 of the Act and of Rule 101 of Title 4 of the California Administrative Code. No charge was

<sup>11</sup>Indeed, two of the accusations are virtually current having been filed with the Department on December 5, 1979.

made in this accusation that the Gallo distributor had in any way violated the retail to consumer provisions of §§ 24862 and 24866 or Rule 101. The specific charges were that Midcal had sold wine at wholesale to a retailer for which no wholesale to retail price had been posted with the Department and additionally that it had sold wine at wholesale to retail at prices below those posted with the Department. In both instances, the charges involved sales by this *wholesale* distributor to retailers. In no way were sales at the retail to consumer level involved in the instant case now before this Court. (See Exhibit C, Jt. Appen., pages 16-18.)

In admitting the charges in a stipulation with the Department, Midcal agreed to accept a penalty of either a "monetary fine or a suspension of its license" if the provisions were declared valid after a "judicial determination." (See Exhibit D, Jt. Appen., pages 19-20.)

The final disposition of this accusation against Midcal by the Department is pending and awaits the outcome of the review by this Court. In view of the factual basis of the accusation against Midcal, the stay order issued by the lower court, the continued enforcement by the Department of the sections involved, and the pendency of this accusation against Midcal, questions of "mootness" or "collateral estoppel" are not present in this case.

When a case before this Court involves questions that affect the rights of litigants in the case before the Court it is not "moot." (*Preiser v. Newkirk* (1975) 422 U.S. 395, 401; *North Carolina v. Rice* (1971) 404 U.S. 244, 246.

". . . basically, 'the question in each case is whether the facts alleged, under all the circumstances, show

there is a substantial controversy, between parties having adverse legal interests. . . .”  
(*Preiser v. Newkirk*, supra, at 402.)

No California court had ruled on the validity of the wholesale to retail wine price posting provisions of §§ 24862 and 24866 prior to the decision of the Court of Appeal in this case. Neither has any California Court of Appeal nor the California Supreme Court ruled on the validity of the wholesale to retail wine price posting provisions since the instant case was decided by the California Court of Appeal.<sup>12</sup> To reiterate, the question as to the validity of the wholesale to retail provisions of the California wine statutes and the rule involved in this action have not been ruled upon by any California Appellate Court. However, this is not to say that the holding of the *Capiscean* case, relied upon by Midcal in its contention that the wholesale to retail wine price posting provisions have been ruled upon by California courts, has not been discussed, as indicated below:

<sup>12</sup>The California Act likewise requires the posting of the wholesale to retail prices for distilled spirits (§ 24756 of the Act) and beer (§ 25000 of the Act) and the adherence to those prices by the selling wholesaler. In a petition for writ of mandate in the case of *Farmers Markets, Inc. v. Baxter Rice*, 3 Civil 18743 (see reference in Pet. for Cert., p. 8, fn. 3) these provisions were alleged to be invalid under the Sherman Antitrust Act. The *Midcal* Court of Appeal denied the requested writ “out of hand” and the California Supreme Court denied a petition for hearing on November 15, 1979. A writ was likewise sought in the case of *Ferrigno v. Alcoholic Beverage Appeals Board*, 1 Civil 47118 (see fn. 2, p. 7, Pet. for Cert., and Appendix E, Pet. for Cert.) from another California Court of Appeal. The *Ferrigno* case involved, among other factors, the wholesale to retail price posting provisions for beer. The Court of Appeal denied the request for an alternative writ and the California Supreme Court, on December 27, 1979, denied a petition for hearing. Thus, there has been no declaration of invalidity of the price posting provisions at wholesale for either distilled spirits or beer.

(1) The Court of Appeal in this case interpreted *Capiscean* as only applying to price maintenance provisions as they applied to retail sales. The Court of Appeal, in discussing the effect of the *Capiscean* case stated “See also, *Capiscean Corp. v. Alcoholic Bev. etc. Appeals Bd.* (1979) 87 Cal.App.3d 996 [151 Cal.Rptr. 492], holding the price maintenance provisions relating to the *retail* price of wine to be invalid under *Rice*.” (Emphasis added.) This is a ruling by a state court on the scope of a state court opinion. Midcal cannot now challenge this holding in this Court since, it is generally held, that such an interpretation by a state appellate court is binding on the federal courts. (See e.g., *Six Companies v. Highway District* (1940) 311 U.S. 180, 188.)

(2) In the brief “For the United States as Amicus Curiae” filed recently in this case by the Solicitor General in a footnote on page 7 of its uncorrected typescript, the following conclusion is drawn as to the holding of the *Capiscean* case:

“*Corsetti* had previously been applied to the wine statute with respect to *retail sales to consumers* in *Capiscean Corp. v. Alcoholic Beverage Control Appeals Board . . .*” (Citation omitted.) (Emphasis added.)

(3) Significantly, before this Court granted certiorari in this case and therefore determined to review the federal issues, Midcal itself in its “Brief in Opposition to Petition for Writ of Certiorari” observed, at page 5:

“Subsequently, the matter was appealed to the California Court of Appeal, First Appellate District, where § 24862 was declared invalid as it pertains to

minimum consumer resale prices. (*Capiscean Corp v. Alcoholic Beverage Control Appeals Board*, 87 Cal. App.3d 996, 151 Cal.Rptr. 492 (1979).) (Emphasis added.)

There is no question that this case is properly before this Court; that this Court can review the merits of this case, and, if it determines, as Petitioner urges it should, that the court below erred in application of the federal law to the California regulatory provisions involved, it can then reverse this decision, and send it back to the California Court of Appeal which will then follow the decision by this Court. It is likewise clear that the Department will "comply fully" with such a decision and impose the penalty on Midcal for its violation of the valid California regulatory provisions involved.<sup>13</sup>

A discussion of collateral estoppel is prompted only by Midcal's recent assertion of its applicability here. As demonstrated in the discussion of the factual basis of this case above, and in the discussion of the California law on collateral estoppel which follows, the doctrine is simply not involved in this case before this Court.

At pages 16 and 17 of Midcal's "Memorandum in Response to Motion of State Attorney General to Present Oral Argument in Support of Petitioner and Suggestion of Mootness", Midcal claims that the Department is col-

<sup>13</sup>See two page "Statement of Department . . ." to this Court dated November 29, 1979, wherein the Department stated that it felt that "as a constitutional agency of the State of California it is bound by the holdings of the highest court of this State [referring to *Rice (Corsetti)*] . . .". The Department added, however, ". . . To be sure, should this Court overrule the holding of the California courts this Department would comply fully with such decision . . ."

laterally estopped by the decision of the California Court of Appeal in *Capiscean*. As authority for this proposition, it cites *Bernhard v. Bank of America*, 19 Cal.2d 807, *City of Los Angeles v. City of San Fernando*, 14 Cal.3d 199, *Hollywood Circle, Inc. v. Department of ABC*, 55 Cal.2d 728 and *Chern v. Bank of America*, 15 Cal.3d 866. Even a cursory reading of these cases demonstrates the non-application of the doctrine to this case.

Initially, it should be pointed out that under California law collateral estoppel does not apply to an issue of law when it is being asserted to prevent enforcement of a state statute by a state agency such as the Department. As a result, collateral estoppel, even if the doctrine were otherwise relevant here, would not apply for that reason alone.

"The rule of collateral estoppel is a manifestation of the principle of res judicata. [cite] The courts will not apply that principle to foreclose the relitigation of an issue of law covering a public agency's ongoing obligation to administer a statute enacted for the public benefit and affecting members of the public not before the court. (*Chern v. Bank of America* (1976) 15 Cal.3d 866, 872 [127 Cal.Rptr. 110, 544 P2d 1310]; *Louis Stores, Inc. v. Department of Alcoholic Beverage Control*, 57 Cal.2d 749, 758 [22 Cal.Rptr. 14, 371 P2d 758] . . .)" (*California Optometric Assn. v. Lackner*, 60 Cal.App.3d 500, 505, 131 Cal.Rptr. 744 (1976).)

The cases cited by Midcal generally hold that once parties litigate a matter, they are estopped from relitigating questions of fact or law which were necessarily decided in the former action and which arise from the same transaction or where the subject matter of the action is the same property.



In *Bernhard v. Bank of America, supra*, cited by Midcal, a probate court held that money in the defendant's account was a gift from a decedent and that plaintiff had no claim to it. The plaintiff later brought another action in the superior court to recover the money in defendant's account. The California Supreme Court held that res judicata applied and that the plaintiff was barred from relitigating the same claim, arising from the same transaction and involving the same money.

The present case does not arise from the same transaction or set of circumstances as the *Capiscean* case. The *Capiscean* case involved similar questions of law but did not arise from the same transaction as this case. These were two separate actions against two different violators. Persons subsequently accused of law violations are not barred from raising a legal defense just because it was raised in the past.

The *Hollywood Circle* case, *supra*, was also a case where the plaintiff attempted to relitigate the exact same claim. Its liquor license was revoked by the Department and it appealed to the Alcoholic Beverage Control Appeals Board. The Appeals Board dismissed the appeal as not timely filed based on an erroneous interpretation of a statute. Plaintiff sought a writ of mandate in the superior court which was denied. It appealed but the Court of Appeal affirmed the superior court. The California Supreme Court denied its petition for hearing. Later, in another case not involving Plaintiff, the California Supreme Court disapproved the earlier Court of Appeal decision. Plaintiff thereupon attempted to relitigate his earlier case by

again seeking the issuance of a writ of mandate based on the California Supreme Court's decision. The California Supreme Court held that the plaintiff was barred by the doctrine of res judicata even though the prior decision was erroneous since he had fully litigated the issue before. This case does not apply to *Midcal* because the *Midcal* case did not arise from the same transaction as the *Capiscean* case.

Another case that Midcal cites for its proposition is *City of Los Angeles v. City of San Fernando, supra*. The Supreme Court in that case held that there was no res judicata or collateral estoppel effect between the same parties if the second action was a different cause of action. The Court stated, at page 230:

" . . . This court observed in *Louis Stores, Inc. v. Department of Alcoholic Beverage Control* (1962) 57 Cal.2d 749, 757, as follows: 'An important qualification of the doctrine of collateral estoppel is set forth in section 70 of the Restatement of Judgments, which reads as follows: "Where a question of law essential to the judgment is actually litigated and determined by a valid and final personal judgment, the determination is *not* conclusive between the parties in a subsequent action on a different cause of action, except where both causes of action arise out of the same subject matter of transaction; and in any event it is not conclusive if injustice would result." ' " (Emphasis added.)

Midcal also cites *Chern v. Bank of America, supra*. In this case, the California Supreme Court distinguished the *Bernhard* line of cases.

"As will appear, a principal issue in the instant case is essentially a legal one, namely, whether defendant's alleged practice constitutes false or misleading advertising under California law. . . . in contrast, the estoppel cases relied on by defendant, including *Bernhard*, involved attempts to relitigate factual issues arising out of the same subject matter or transaction as the prior suit. The difference is significant.

"We acknowledge, further, a sound judicial policy against applying collateral estoppel in cases which concern matters of important public interest. In *Louis Stores, Inc. v. Department of Alcoholic Beverage Control* (1962) 57 Cal.2d 749, for example, we declined to give estoppel effect to bar an administrative agency from relitigating the issue of whether a certain practice by a defendant constituted sufficient cause to revoke a liquor license, noting that the statute authorizing the revocation of licenses 'concerns the public interest in an industry requiring close supervision.' . . . Given the quality and intensity of the public interest involved, a reexamination of the legal significance of recurring factual events in which the same plaintiff is involved should not be foreclosed under collateral estoppel principles. For this reason and the other reasons hereinabove discussed, we decide the legal issues raised by plaintiff in the present suit." (*Chern v. Bank of America*, 15 Cal.3d 866, 872-873).

In the *Louis Stores, Inc. v. Department of Alcoholic Beverage Control* case cited above, the California Supreme Court adopted § 70 of the Restatement quoted above. The Court also adopted the reasoning of comment "f" to that section:

"The determination of a question of law by a judgment in an action is not conclusive between the parties in a

subsequent action on a different cause of action, even though both causes of action arose out of the same subject matter or transaction, if it would be unjust to one of the parties or to third persons to apply one rule of law in subsequent actions between the same parties and to apply a different rule of law between other parties." (57 Cal.2d 749, 757.)

This reasoning was followed in several other California cases. In *Cochran v. Union Lumber Co.* (1972) 26 Cal.App. 3d 427, the court refused to apply collateral estoppel. An earlier case brought by another plaintiff had litigated the meaning of a clause in a contract with Union Lumber Company who was the defendant in that action. That court interpreted the clause against Union Lumber. In the later action brought by Cochran against Union Lumber, Cochran sought an interpretation of an identical clause in his contract with Union Lumber. The Court of Appeal cited *United States v. Stone & Downer Co.*, 274 U.S. 225, 235-237 and *Louis Stores v. Department of Alcoholic Beverage Control*, supra, and held that the trial court was not estopped from deciding the identical legal issue involved in the earlier case. *Louis Stores* was also followed in *Bleech v. State Board of Optometry* (1971) 18 Cal.App.3d 415, 430. The *Bernhard* line of cases cited by Midcal states that the collateral estoppel effect does not apply if important public issues are at stake. As stated in the *Louis Stores* case, the State has an important interest in regulating alcoholic beverages. The California Legislature specifically declared in § 23001 of the Act:

"The subject matter of this division [entire Act] involves in the highest degree the economic, social, and

moral well-being and the safety of the state and all of its people."

Further, the *Bernhard* line of cases require mutuality. A party cannot assert collateral estoppel against the other party unless that other party could have asserted estoppel had the earlier decision gone the other way. In this case, for example, under California law, the Department could not have asserted estoppel against Midcal in its challenge of the statute if the *Capiscean* licensee had lost.

In light of the foregoing authorities, there can be no question that the doctrine does not apply in this case. Midcal bases its mootness argument on the effect of collateral estoppel, the mootness argument is without merit.

Turning now to the *consumer* price maintenance provisions of the wine regulatory provisions involved, and to the *Rice (Corsetti)* case which involved *retail* to consumer price maintenance provisions for distilled spirits, it would appear that a short analysis of that situation is in order. First of all, Petitioner is aware of no law or judicial precedent which in any way would prevent or forbid this Court from *overruling*, as opposed to *reversing*, the decision of the California Supreme Court in the *Rice (Corsetti)* case. The same would hold true of the *Capiscean* case. Midcal seemingly is contending it is somehow "too late" for this Court to overrule the *Rice (Corsetti)* case and clear up the state- and nation-wide confusion and uncertainty engendered by that decision by California's highest state court contrary to the well-established federal law involved.

Surely this Court is not without power to eliminate the effect of the *Rice (Corsetti)* case first in connection with ruling on the instant case since the court below based its decision on the "rationale" of the *Rice (Corsetti)* case, and deemed itself "controlled by the reasoning of the Supreme Court in *Rice*." (Pet. for Cert., A-5.) Although Petitioner does not concede that the rationale of the *Rice (Corsetti)* case necessarily compels a declaration of invalidity of the wine wholesale to retail price posting provisions involved, there are certain similar features of these provisions and the price maintenance provisions involved in *Rice (Corsetti)* that are significant in that regard. We refer specifically to the fact that generally it is a domestic wine producer or an in-state agent of an out-of-state wine producer who sets and posts the wholesale to retail and retail to consumer prices for its own branded wine rather than the seller, a requirement found objectionable by the *Rice (Corsetti)* case.<sup>14</sup> This feature distinguishes the wine price posting provisions at wholesale from those involving distilled spirits and beer (§§ 24756 and 25000). In any event, the *Rice (Corsetti)* case is incorrectly decided, and so long as it remains "on the books" without being specifically

<sup>14</sup>There are exceptions to this general statutory requirement that the wine producer or authorized agent set the wholesale and retail selling price of wine. For example, in the case of imported wine § 24867 provides, in part:

"... Provided, however, that when two or more persons without the state sell the same brand of wine to importers in this state, each such *importer* may file *his own selling prices to retailers* for the brand." (Emphasis added.)

Or where the wholesaler himself owns the brand. See subsection (b) of § 24866.



"overruled" by this Court, it will continue to create uncertainty, confusion and havoc in California<sup>15</sup> as well as nationally.<sup>16</sup>

The Midcal brief also tends to create an impression that the California Legislature has abandoned any statutory provisions that have an "anti-competitive" effect in liquor regulation and particularly those relating to price.

Section 24755, declared invalid by the California Supreme Court in 1978, has not been repealed by the California Legislature. Sections 24862 and 24866, declared invalid in this case, have not been repealed by the California Legislature. The price posting provisions at wholesale for distilled spirits and beer have not been repealed by the

<sup>15</sup>On December 31, 1979, the *Midcal* Court of Appeal issued an alternative writ in the case of *Norman Williams Company, et al. v. Baxter Rice*, 3 Civil 19089. Petitioner in that matter challenges the validity of the provision in the California Act that requires the distillers to designate its importers in California and prohibits importation by an importer unless so designated. One of the grounds urged by petitioner is that the section is invalid under the rationale of the *Rice (Corsetti)* case. There are 17 other states having similar "designation" or "primary source" statutes in their law relating to alcoholic beverages. Kansas, in 1979, adopted, for the first time, such a provision. (See Chapter 153 of the 1979 Session Laws of Kansas, House Bill 2020.) On November 14, 1979, the Kansas Supreme Court upheld the validity of that provision and others, including "minimum mark-up" provisions for the retail sale of alcoholic liquor to replace the earlier system whereby the state established the minimum prices. At the time of filing this brief the Kansas Supreme Court had not yet "supplemented" its decision by a "formal opinion." The decision of the Kansas Supreme Court is included in the Appendix to this brief as Exhibit "D".

<sup>16</sup>See *Castlewood Intern. Corp. v. Simon*, Pet.'s. Opening Brief, p. 13, 41 and 42; *In the Matter of William J. Mezzetti Associates, Inc. v. State Liquor Authority*, Pet. for Cert. pp. 34, 35 where the New York retail fair trade provisions for wine are being questioned and where the *Rice (Corsetti)* case has been cited—but not followed by the Appellate Division.

California Legislature and as noted have withstood challenge similar to that in the instant case.

When California repealed its general fair trade statute in 1975 (1975 Cal. Stats., Ch. 402) it left the various sections of the Act relating to price regulation for liquor intact.

Although, again, Petitioner submits that the matter is not relevant to any issues involved in this review, a brief discussion of Midcal's reference to Assembly Bill 935 at page 14 of its brief seems in order. Midcal states:

"The Legislature also rejected AB 935, an attempt, opposed by the ABC, to revive fair trade in the form of a minimum price markup for distilled spirits at the retail level. . . ."

A fair reading of that comment would seem to indicate that there had been an unfavorable vote by the California Legislature on AB 935. That is simply not true. Included in the appendix as Exhibit "E" to this brief, is the first page of the transcript of the hearing of Monday, November 20, 1978, before the California Senate Committee on Governmental Organization, this being the same hearing to which the letter of December 4, 1978, from Chairman Dills to Senator Mills included as Exhibit "C" in Midcal's "Memorandum in Response to Motion of State Attorney General . . . etc." refers.

The most significant paragraph from that page is as follows:

"AB 935, the Alcoholic Beverage Unfair Practices Act, was heard and *approved* by this committee on August

7, 1978. At a later date, the measure was rereferred to this committee by the Senate Finance Committee for an interim study." (Emphasis added.)

At the time the hearing was conducted, the Midcal case was filed and pending and would determine the validity of the *Rice (Corsetti)* case, and § 24755, (retail price maintenance for distilled spirits) if this Court would undertake to review it. As pointed out, § 24755 had not been repealed. The California Legislature has not determined what action to ultimately take on retail price maintenance, if any. The point is that whatever decision is made on what form of price maintenance to have at the retail level, if any, is a matter for the Legislature and not for the courts and the reference to legislative action, or inaction, in that regard, is irrelevant.

Midcal refers to the Governor of California in its brief and in its memorandum seeking to prevent the Attorney General from representing the State of California. The references are apparently based on a theory that the record herein, even if it were deemed to include newspaper articles, transcripts of testimony in hearings not related to the issues in this case, or other matters that are generally thought not to be included in a record on appeal, somehow supports a two-fold proposition:

(1) That the Governor, and not the Attorney General, represents the State of California in liquor litigation and therefore the Attorney General is without authority to appear on behalf of the State of California in this case. (For response to the contention that the Attorney General lacks authority see Petitioner's Memorandum in Response

to Respondent Midcal Aluminum's Opposition to the California Attorney General Dividing Oral Argument With Petitioner," dated November 28, 1979, consisting of four pages), and;

(2) Somewhere in the record there is some indication or proof as to the Governor's "desires", "wishes" or position on the matter of the enforcement of California regulatory provisions relating to liquor.

Questions concerning the Governor's position or the Attorney General's authority are totally irrelevant to any issues in this case. Furthermore, as to the Governor's position as to enforcing California liquor laws there is nothing in any of the material submitted to this Court in the record below, or otherwise, that supports any conclusion as to that irrelevant matter. Additionally, Article XX, Section 22 of the California Constitution and the Act itself places responsibility for administering and enforcing the Act, "in accordance with laws enacted by the Legislature," in the Department. The Director is the head of the Department—not the Governor. The Director's position, taken as Director, and the position he has represented to this Court is that he "is bound by the holdings of the highest court of this State." He further represents to this Court that "should this Court overrule the holding of the California courts this Department would fully comply with such decision." (Statement of Department of Alcoholic Beverage Control of November 29, 1979, directed to this Court.)

Consequently, if Midcal is contending that the Governor or indeed the Department will not abide by a decision of this Court reversing the instant case and overturning the

*Rice (Corsetti)* case, such a contention finds no support in either the record or the vast amount of material submitted in this case that is outside of the record from the court below.

Petitioner regrets that any issues have been raised in this matter before this Court other than the basic question of the extent and scope of the state's power to enact regulatory measures relating to alcoholic beverages under the Twenty-first Amendment. It is Petitioner's urgent hope that the Court's attention has not been diverted from the only issue in the case, and that is, the validity of the California regulatory provisions involved.

### III

#### **CONTRARY TO MIDCAL'S CONTENTIONS PETITIONER RAISED THE EFFECT OF THE WEBB-KENYON ACT BELOW AND BEFORE THIS COURT IN ITS PETITION FOR WRIT OF CERTIORARI AND IT IS REASONABLY AND NECESSARILY INCLUDED IN THE QUESTIONS PRESENTED TO THIS COURT**

Although Midcal argues that the legislative history of the Webb-Kenyon Act and perhaps even the Webb-Kenyon Act itself supports its position that the states' power to regulate liquor (without restriction by the Commerce Clause) is limited to regulatory provisions that either prohibit or restrict "importation" based upon its own interpretation of the language of § 2 of the Twenty-first Amendment, it nevertheless argues to this Court that the Webb-Kenyon Act is not properly before this Court because of an alleged defect in presenting that matter to the court below and of a failure by Petitioner to include it in

the "Questions Presented" in its Petition for Writ of Certiorari.<sup>17</sup> Petitioner did in fact argue the matter before the Court of Appeal as indicated by the statement from its points and authorities filed in that court.<sup>18</sup>

In its Petition for Writ of Certiorari to this Court, Petitioner alludes to or discusses the Webb-Kenyon Act on three different pages.<sup>19</sup>

Further, it would appear without question that the legislative history of the Acts that predated the Twenty-first Amendment, including both the Wilson Act and the Webb-Kenyon Act, is helpful both in an understanding of the background of the Twenty-first Amendment, and also because of the direct impact by the Webb-Kenyon Act on the interstate nature of liquor, having removed it from interstate commerce.

The federal statute, Webb-Kenyon, that was "constitutionalized" by the Twenty-first Amendment would seem a particularly appropriate statute to consider in this review. (See *Craig v. Boren*, 429 U.S. 190 at page 206.)

Additionally, there would appear to be no serious question that the Wilson Act and the Webb-Kenyon Act are properly included within the questions to be considered by this Court, as indeed this Court itself in the case of *Craig v. Boren*, supra, chose to discuss the history of liquor regulation by the states, including the Webb-Kenyon Act. (*Craig v. Boren*, supra, pp. 205-206.) (See also, *Blonder-*

<sup>17</sup>Midcal Brief, p. 33.

<sup>18</sup>Page 3, Points and Authorities in Support of Intervenor's Opposition to Petition for Writ of Mandate, p. 232 of Certified Record.

<sup>19</sup>Pet. for Cert., pages 11, 20 and 21.



*Tongue Lab., Inc. v. University of Illinois Found.* (1971) 402 U.S. 319, 320—Court may consider questions even if not raised by the parties.)

The basic issue in this case is whether or not the regulatory provisions involved are a proper exercise of the states' power to regulate liquor under the Twenty-first Amendment in view of the Commerce Clause and the Sherman Act. Certainly a federal statute that removes liquor from interstate commerce is a significant part of that issue. Consequently, the Webb-Kenyon Act is an issue that is "fairly comprised" within the "Questions Presented" in the Petition for Certiorari. (Supreme Court Rule 23.1(c).) Midcal's objection has no merit.

#### IV

**THIS COURT SHOULD NOT NOW LIMIT A STATE'S LEGISLATIVE POWER BUT SHOULD REAFFIRM THE DOCTRINE THAT HAS BEEN APPLIED CONTINUOUSLY SINCE THE RATIFICATION OF THE TWENTY-FIRST AMENDMENT THAT WHEN A STATE ACTS TO REGULATE LIQUOR, WITHIN ITS BORDERS, IT IS "UNFETTERED BY THE COMMERCE CLAUSE" AND THAT THE TWENTY-FIRST AMENDMENT REVERSES THE NORMAL FEDERAL-STATE ROLES UNDER THE COMMERCE CLAUSE**

**A. The Contention, Presently Being Made by Midcal, that the Twenty-first Amendment Simply Grants Power to a State to Prohibit or Restrict the Importation of Liquor Into the State is Contrary to the Rulings of this Court and is Patently and Historically Without Merit**

In its earlier "Brief in Opposition to Petition for Certiorari" herein, Midcal supported the position of the California Supreme Court in *Rice (Corsetti)* that the court should apply a "balancing of the interests" test to determine the validity of a state legislative program regulating

liquor within its borders. In its present brief before this Court and for the first time in this litigation, Midcal now virtually abandons that support and argues for an interpretation of the Twenty-first Amendment that would restrict a state's power under the Twenty-first Amendment to either prohibiting the importation of liquor or restricting its importation.

Midcal is now contending that the two phrases in § 2 of the Twenty-first Amendment, namely, "transportation or importation" of liquor "into any State . . ." constitutes the "key concept that governs every other word in the Section." (Midcal's Brief, p. 41.)

Midcal continues in this vein at that same page: ". . . It requires a tortured reading indeed to convert the language of § 2 into an across-the-board repeal of the federal antitrust laws or into a plenary grant of authority to the states over all aspects of the alcoholic beverage business, *whether or not related to unwanted importation. . . .*"

Further proof that Midcal's entire argument in this regard is based upon what it apparently considers to be the literal language of § 2 is also found on page 41, where in attempting to refute Petitioner's position in this case on the meaning of the Twenty-first Amendment it states that ". . . the text of the provision will not support it. . . ."

Midcal further takes the position that the legislative history of § 2 of the Sherman Act justifies its interpretation that it was intended only to permit "dry" states to remain "dry." Midcal argues that "In sum, the legislative history of § 2, the provision relied on by Petitioner, illustrates a

purpose simply to allow prohibition to those states that really wanted it. It does not indicate that the Amendment was designed to do more than that." (Emphasis added.) (Page 47, Midcal Brief.)

Midcal's new position is not supported by the long line of judicial precedent by this Court beginning with *State Board v. Young's Market Co.*, 299 U.S. 59, the first case decided by this Court in 1936 after the Amendment was ratified by the states in 1933, nor is it supported by the legislative history of either the Twenty-first Amendment or the Webb-Kenyon Act, and it is not supported by, either reason or logic, all as discussed hereinafter by Petitioner.

**B. None of the Authorities Cited by Midcal Stand for the Proposition that the Twenty-first Amendment Simply Allows a State to Prohibit or Restrict the Importation of Liquor Into a State; this Court Has Never So Held**

Beginning at page 42 of Midcal's brief, an attempt is made to support its position that the Twenty-first Amendment should be interpreted to only allow a state to either prohibit the importation of liquor into its borders or to place restrictions on its importation. Midcal cites the dissenting opinion of Mr. Justice Marshall in *California v. La Rue* (1972) 409 U.S. 109; *United States v. Tax Comm'n of Miss.* (1973) 412 U.S. 363; the California Supreme Court case of *Sail'er Inn, Inc. v. Kirby, Director of ABC* (1971) 5 Cal.3d 1; and *Lamp Liquors, Inc. v. Adolph Coors Co.* (1977) 563 F.2d 425. None of these cited authorities support the proposition contended for.

*California v. La Rue*, supra, in which Mr. Justice Marshall dissented from the majority opinion, involved

the validity of a state regulation alleged to interfere with rights protected by the First Amendment's guarantee of free speech. The regulation applied only to strictly local activity, i.e., the conduct within a licensed premise in California. Since the case dealt with a portion of the Constitution other than the Commerce Clause, i.e., the First Amendment, this Court considered the respective interests of the state in regulating liquor and of the First Amendment in protecting free speech and the majority concluded that the Twenty-first Amendment should prevail. Mr. Justice Marshall, in weighing the respective interests, concluded the First Amendment considerations should have prevailed. Mr. Justice Marshall's observation with regard to the language of § 2 of the Twenty-first Amendment, it would appear to Petitioner, should be read in the context of that case and the issues involved there rather than being cited as authority for such a drastic change in the federal-state roles.

Midcal likewise cites *United States v. Tax Comm'n of Miss.*, supra, as supporting its new interpretation of the Twenty-first Amendment. That case dealt with an attempt by the State of Mississippi to impose a tax upon the distributor of alcoholic beverages on a federal military enclave. The case is consistent with other cases of this Court.

As discussed in Petitioner's Opening Brief, page 40, the state's power to regulate liquor has been deemed not to include generally such regulation on federal enclaves. (See *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518.) Thus, the case is in no way inconsistent with this Court's

frequent statement that the power of the states to regulate liquor within their borders is "unfettered by the Commerce Clause." (*Ziffrin, Inc. v. Reeves* (1939) 308 U.S. 132, 138; *National Railroad Passenger Corp. v. Miller* (1973) 358 F.Supp. 1321, aff'd. 414 U.S. 948.)

*Sail'er Inn, Inc. v. Kirby, Director of ABC*, supra, involved a California statute, a part of the Act, prohibiting the employment of female bartenders. The California Supreme Court held the statute violated the Equal Protection Clause and the Federal Civil Rights Act. Although this case was not a decision of this Court, it is not necessarily inconsistent with this Court's decisions since it relates to provisions of the Constitution other than the Commerce Clause. (See *Craig v. Boren* (1976) 429 U.S. 190, re sex discrimination violating the Equal Protection Clause.) It could be argued that under *California v. La Rue*, supra, the Court could have determined that the statute was valid since one could find support for such a classification. (In fact, in the case of *Kraus v. Sacramento Inn* (1970) 314 F.Supp. 171, the Federal District Court for the Northern District of California held the same statute to be within the power granted to the state by the Twenty-first Amendment, and stated that it "does fall within those exclusive powers granted to the states by the Amendment and that it cannot be invalidated by the 1964 Civil Rights Act." At page 175.)

The final case advanced to support Midcal's argument is *Lamp Liquors, Inc. v. Adolph Coors Co.*, supra. The very quotation cited by Midcal destroys the case's precedential value in supporting Midcal's contention. As quoted on page

44 of Midcal's brief, the Twenty-first Amendment was described by that court as follows:

"... Its *main purpose*, then, would appear to have been to give a dry state power to protect itself from importation of liquor into the state for use therein." (Emphasis added.)

Petitioner submits that the authorities cited by Midcal do not support the interpretation now contended for in respect to § 2 of the Twenty-first Amendment.

**C. Contrary to the Contention of the Solicitor General in this Case, Once a State Has Exercised Its Legislative Power Under the Twenty-first Amendment and Enacted Provisions Regulating the Sale of Liquor Within Its Borders, Which Have No Significant Extra-territorial Effect, Congress is Without Power, Under the Commerce Clause, to Preempt the State Legislation**

In its "uncorrected typescript of the brief for the United States as amicus curiae" the Solicitor General, (apparently joined by the Federal Trade Commission<sup>20</sup> and seemingly likewise reflecting the views of the Bureau of Alcohol, Tobacco & Firearms,)<sup>21</sup> somewhat echoes the present argument of Midcal as to this new interpretation to be given to § 2 of the Twenty-first Amendment. However, whereas Midcal appears to be arguing for the imposition of its interpretation of the Twenty-first Amendment to apply only to the Sherman Act,, the brief of the United States urges a total reversal of the roles of the federal and state government in

<sup>20</sup>The "uncorrected typescript" of the brief of the United States, according to the signature lines, is joined in by "Michael N. Sohn, General Counsel, Federal Trade Commission."

<sup>21</sup>See p. 3 of the "uncorrected typescript" where the statement is made that "The United States is also responsible for enforcement of the Federal Alcohol Administration Act. . . ."



regulating liquor within a state's boundaries and contends that the Supremacy Clause bestows upon Congress the power to enact legislation regulating liquor within a state's boundaries and preempts any state regulatory provision regarding liquor that might be in conflict, irrespective of the Twenty-first Amendment. The United States position is well illustrated on page 3 of its "uncorrected typescript" in the following language:

"... The United States thus has an interest in assuring that these laws ["Federal Alcohol Administration Act and the many other federal regulatory statutes (e.g., securities and labor laws)"] will not be subject to *de facto* revocation by the states *absent action by Congress subordinating its own power over interstate Commerce in liquor to that of the states.*" (Emphasis added.)

Again illustrating the United States complete repudiation of the present law relating to the regulation of liquor by a state within its borders is the following comment made on page 10 of the "uncorrected typescript", in referring to the California Supreme Court decision in *Rice (Corsetti)*:

"... a state law that is fundamentally inconsistent with federal law is unenforceable under the Supremacy Clause, ..."

Again, on page 14 of the "uncorrected typescript," the United States demonstrates its rejection of the Twenty-first Amendment as a source of legislative power in the states with regard to regulating liquor within their borders with the following comment:

"... The California statutes are accordingly preempted under established Supremacy Clause analysis."

(No authority interpreting the federal/state relationship in the regulation of liquor or the Twenty-first Amendment's relationship to the Commerce Clause is cited for this proposition.)

The United States further argues that the Federal Alcohol Administration Act, 27 U.S.C. 201 et seq., was "intended ... the [sic] to override contrary state law. . . ." The United States cites only one case from this Court apparently for the proposition that the Federal Alcohol Administration Act overrides all "contrary state law" and that is the case of *Jamison & Co. v. Morgenthau* (1939) 307 U.S. 171, in which the Court, although questioning its own jurisdiction, affirmed the constitutionality of the Federal Alcohol Administration Act.

The urgings to this Court by the Solicitor General that it repudiate the long-established federal-state role in liquor regulation should be rejected as totally lacking in merit. As discussed in the next section the argument is not supported by any authority, cited or otherwise.

**D. The Only Decision of this Court Cited by the Solicitor General to Support His Contention that Congressional Acts Preempt State Liquor Regulation Within the Boundaries of a State Involved a Federal Regulatory Provision Prohibiting the Importation Into the United States of Improperly Labeled Scotch Whiskey; there was No State Law Involved**

The only case of this Court, cited by the Solicitor General to support his total preemption argument is *Jamison & Co. v. Morgenthau*, supra. *Jamison* is an example of a case which demonstrates the meaning of the phrase "the Twenty-first Amendment does not *pro tanto* repeal the Commerce Clause," (see *Craig v. Boren*, supra) but that

Congress retains the power under the provision of that clause (and the Export-Import clause, see *Department of Revenue v. James B. Beam Distilling Co.* (1964) 377 U.S. 341) to "regulate commerce with foreign nations." (See Appendix A to Pet. Open. Brief for text of Commerce Clause.)

The *Jamison* case involved a federal regulatory provision prohibiting the importation into the United States of improperly labeled Scotch whiskey. Additionally, there was in fact no state law involved. Consequently, the case only demonstrates that Congress does have power under the Commerce Clause to "regulate commerce with foreign nations."

*Hostetter v. Idlewild Liquor Corp.* (1964) 377 U.S. 324, likewise recognized the existence of this congressional power to regulate foreign trade. (See discussion of *Idlewild* in Pet. Open. Brief at page 38 and 39.)

However, under the Twenty-first Amendment and the Webb-Kenyon Act, it is clear that when a state regulatory provision relating to the control of liquor within its borders is in conflict with an Act of Congress passed under its powers to regulate interstate commerce, the state provisions prevail. (See discussion of *Castlewood* case, pages 41 and 42, Pet. Open. Brief.)

Obviously, if a state attempts to override Congress in the field of foreign trade, it is acting in excess of its power and must yield to the superior federal power as illustrated by the *Jamison* and *Idlewild* cases. However, when a state legislates concerning the sale, possession or consumption of alcohol within its borders, conflicting federal laws must yield to the state's constitutionally granted power.

To illustrate, by way of analogy to the effect of the Twenty-first Amendment, in the case of *Seaboard Air Line Ry. v. North Carolina* (1917) 245 U.S. 298, this court held that under the Webb-Kenyon Act, a state law, which required a railroad to disclose information, upon request, concerning consignees of liquor shipments, was a valid state requirement even though disclosing such information was forbidden by an Act of Congress, ("Act to Regulate Commerce," 36 Stat. 539.) passed under the Commerce Clause.

In the *National Railroad Passenger Corp. v. Miller* case (1973) 358 F.Supp. 1321, aff'd. at 414 U.S. 948, the Court held that if an Act of Congress passed under the Commerce Clause were construed as allowing service of liquor in violation of a Kansas regulatory law, the congressional act would be unconstitutional. (See Pet. Open. Brief, pages 28-30.)

In *U.S. v. Frankfort Distilleries* (1945) 324 U.S. 293, Justice Frankfurter, in his concurring opinion, declared that since the Sherman Act was enacted by Congress pursuant to the authority of the Commerce Clause, it is subordinate to state laws passed under the Twenty-first Amendment. Id. at 300-302.

In the *Castlewood* case, *supra*, it was held that a Florida liquor law prevailed over a conflicting regulation of the federal Bureau of Alcohol, Tobacco & Firearms. (See discussion of *Castlewood* in Pet. Open. Brief at pages 13, 41 and 42.)

When viewed in the light of the foregoing authorities, and the absence of contrary authority, the Solicitor Gen-

eral's contention that federal laws have preempted the states' powers in the liquor field is patently without merit.

The citation of the Third Circuit Court case of *Norman's on the Waterfront, Inc. v. Wheatley* on page 18 of the "uncorrected typescript" is misleading. The case does not stand for a limited interpretation of the Twenty-first Amendment—its holding was that under the Organic Act creating the territory, i.e., the Virgin Islands, the territory did not possess the power to enact this type of legislation.

The acceptance of the present views of the United States as presented by the Solicitor General with the apparent concurrence of the Federal Trade Commission would take away from the states a role that has been judicially recognized since at least *The License Cases* in 1830. That is, never during all of the years of federal/state "tug of war" over who regulated liquor in "interstate commerce" through the Wilson Act and Webb-Kenyon Act eras, and following those eras of uncertainty up to date, i.e., some approximately 150 years, the power of a state to regulate liquor within its borders where there was no extra-territorial effect or where the liquor was not being imported from a foreign country, has never been seriously questioned. The area of question about the states' power to regulate liquor arose under the Commerce Clause interpretation by this Court, shortly prior to the adoption of the Wilson Act, as to what constituted interstate commerce, where the Court had removed from the control of states the importation of liquor into their boundaries. (See Pet. Open. Brief., p. 11-12.)

The position now being argued for by the United States through the Solicitor General is a new position for the United States. That is demonstrated by a brief filed by the Solicitor General at the request of this Court in the case of *Heublein, Inc. v. So. Car. Tax Comm'n.* (1972) 409 U.S. 275.<sup>22</sup>

In that brief, the Solicitor General correctly analyzed and presented the law as to the meaning and effect of the Twenty-first Amendment as illustrated by the following quotation from pages 5 and 6 of that brief:

"There appears to be no basis for questioning South Carolina's authority under the Twenty-first Amendment thus to control and localize the movement, distribution, and sale of alcoholic beverages, whether produced within or without the State. *State Board v. Young's Market*, 299 U.S. 59. As this Court pointed out in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 325, 330:

'This court made clear in the early years following adoption of the Twenty-first Amendment that by virtue of its provisions a state is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders. . . .'

"And the court added in *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341, 346:

'There can surely be no doubt either, of [a State's] plenary power to regulate and control, by taxation or otherwise, the distribution, use, or consumption

<sup>22</sup>"This memorandum is submitted in response to the Court's order of February 29, 1972 inviting the Solicitor General to express the views of the United States." (First page of the text of that brief.)



of intoxicants within her territory after they have been imported . . .'

"South Carolina's controls over liquor produced in other states are of a piece with the control over liquor produced within the State. . . ."

Surely it should make no difference in the presentation of arguments to this Court insofar as the correctness of the analysis is concerned whether the Solicitor General has been invited to submit a brief on behalf of the United States by this Court or whether the Solicitor General submits a brief apparently in part at least on behalf of other federal agencies. Petitioner would submit that the brief filed by the Solicitor General on behalf of the United States in the *Heublein* case was a correct analysis of the law, and would point out that there has been no change of any kind or nature in the interim to justify a new interpretation of the Twenty-first Amendment taking away from the states the power they have had and exercised for approximately 150 years.<sup>23</sup>

Petitioner would respectfully urge that the contention being made by the United States, in effect, that the federal government should replace the state governments in the field of liquor regulation within the states' border should be rejected and the states be allowed to exercise their traditional power as guaranteed by the Twenty-first Amendment.

<sup>23</sup>Thus, if the position of the United States were adopted that any congressional legislation would preempt the states' regulatory powers in the field of liquor regulation, the so-called "monopoly" states would be subject to Congress as to whether or not they could in fact engage in the business of distributing and selling liquor, and indeed, fixing the prices as the sole distributor of liquor within a state. (See fn. 1, p. 4, Pet. Open. Brief.)

**E. The Limited Concept of what Constituted Inter-state Commerce, as Enumerated by this Court, at the Time of the Ratification of the Twenty-first Amendment in 1933 Made Unnecessary Any Language in Section 2 Specifically Covering the Regulation of Liquor Within the States' Borders Since the States Already Possessed that Power**

Midcal emphasizes, in advancing its "importation" only interpretation of § 2 of the Twenty-first Amendment, that in the legislative history and debates concerning the Wilson Act, the Webb-Kenyon Act, and the Twenty-first Amendment, the emphasis appeared to be on the need for the states to have the power to prohibit or restrict the importation of liquor into their states. What this argument overlooks is that during the period of the debates on the two statutory provisions and the Twenty-first Amendment, the states clearly had the power, and in fact exercised it, to regulate liquor within their borders. The problem developed because the Commerce Clause, after *The License Cases*, and before the adoption of the Wilson Act, was interpreted to prevent a state from prohibiting or restricting imports into its borders. In the Wilson Act, Congress attempted to remove that interpretation of the Commerce Clause. In the Webb-Kenyon Act, Congress sought to further strengthen the states' position with respect to the then concept of interstate commerce by "removing liquor from interstate commerce." Further, at the time of the debates on the resolution which became the Twenty-first Amendment and its ratification, the concept of what constituted interstate commerce remained basically the same, i.e., the states retained the full power to regulate liquor within their borders. Therefore, the emphasis on "importation" into the state was understandable since it was indeed

the "main consideration." However, to argue from that situation that therefore the Twenty-first Amendment goes no further than to allow the states to either prohibit or restrict the importation of liquor, and therefore, in effect, takes away from the states their traditional power to regulate liquor within their borders and to further argue that the states' powers were limited to the 1933 interpretation of the reach of the Commerce Clause is illogical, unreasonable, contrary to established constitutional principles and is likewise contrary to the decisions of this Court which have over and over again confirmed the states' power under the Twenty-first Amendment to regulate liquor within their borders.

What Mideal is asking this Court to rule is that the concept of what constitutes interstate commerce under both the Webb-Kenyon Act and the Twenty-first Amendment should be "frozen" as it existed in 1933 when the Twenty-first Amendment was ratified and/or 1935 when the Webb-Kenyon Act was re-enacted, insofar as a state's power to regulate liquor within its borders "unfettered by the Commerce Clause" is concerned.

It should go without saying that if the concept of what constitutes interstate commerce under the Commerce Clause has been expanded to reach into almost every aspect of trade, business or commerce within a state, that it is equally reasonable and constitutionally required that the concept be interpreted in the same fashion as far as the effect of the Twenty-first Amendment on the Commerce Clause.

Before the events of the 1930's triggered the trend by this Court toward an expansive "substantial effect" analysis

of the Commerce Clause, it was accepted law that the Commerce Clause applied predominately to goods only while in the stream or current of interstate commerce. (Cf. *Labor Board v. Jones & Laughlin* (1936) 301 U.S. 1, and *Schechter Corp. v. United States* (1935) 295 U.S. 495.)

The power of Congress to regulate interstate commerce under the Commerce Clause and thereby supersede the state's power over commerce was limited to that time when the goods were in the actual flow of interstate commerce and had not yet "come to rest" within a state's borders. Congressional power was limited to cases where goods were being held for future use or sale with respect to an interstate transaction, i.e., goods temporarily within a state. (*Schechter Corp. v. United States*, supra, at page 543, and *Swift & Co. v. United States* (1905) 196 U.S. 375.)

The limited construction of the Commerce Clause, at that time (1935), was reflected, for instance, in the effect given to the Sherman Act. Anti-competitive acts had to have a "direct" effect on interstate commerce.

"The distinction between direct and indirect effects has been clearly recognized in the application of the Antitrust Act. Where a combination or conspiracy is formed, with the intent to restrain interstate commerce or to monopolize any part of it, the violation of the statute is clear. [omit cites] But where the intent is absent, and the objectives are limited to intrastate activities, the fact that there may be an indirect effect upon interstate commerce does not subject the parties to the federal statute notwithstanding its broad provisions. . . ." (*Schechter Corp. v. United States*, supra, at 547.)

It would appear that the California regulatory provisions involved in this proceeding, even in the absence of the Twenty-first Amendment or the Webb-Kenyon Act, would not have violated the Sherman Act in 1933. The Commerce Clause would simply have been held not to extend into these intrastate activities of the state at that time. This analysis is supported by *Old Dearborn Co. v. Seagram Corp.* (1936) 299 U.S. 183, where this court validated an Illinois fair trade law (before the Miller-Tydings Act) against a Sherman Act challenge, which was included among other contentions advanced as to reasons for declaring its invalidity.

At the time of the ratification of the Twenty-first Amendment, if the alleged anti-competitive conduct was seen not to constitute commerce under the then interpretation of what constituted "interstate commerce", the Commerce Clause based Sherman Act would not have been applicable. (See *United States v. E. C. Knight Co.* (1895) 156 U.S. 1 [manufacturing not commerce].)

The historical analysis makes evident why the word "importation" was used in drafting the Twenty-first Amendment in 1933. What was required at that time to give the states full power over the regulation of liquor was to remove liquor from the "current" of interstate commerce at the borders of the state. The states already had the power to regulate any goods, including liquor, once the article was no longer in the "flow of commerce". The framers of the Twenty-first Amendment, including the state constitutional conventions that ratified the Amendment, surely could not have intended the Twenty-first

Amendment to limit the regulatory powers which the state already possessed. At the time of the ratification of the Twenty-first Amendment, any specific reference to regulation by the states within their borders would have been mere surplusage.

The net effect of the Commerce Clause and the Twenty-first Amendment, when read in light of each other at the time of the adoption of the Twenty-first Amendment was to remove liquor from the current of interstate commerce and from the normal operation of the Commerce Clause, i.e., the roles of the federal and state governments were "reversed." The plenary legislative power of the states was not diminished by the ratification of the Twenty-first Amendment, instead it was enlarged at the expense of the Commerce Clause which was to be applied only where interstate commerce effects extended beyond the state's borders. (See *U.S. v. Frankfort Distilleries* (1945) 324 U.S. 293.)

Midcal's present contention would render the Twenty-first Amendment meaningless, eliminate the states' power to regulate liquor within their borders, and ultimately lead to the creation of an entirely new and comprehensive federal regulatory system to replace the comprehensive state regulatory systems now in existence.

Petitioner submits that the Twenty-first Amendment has been properly interpreted by this Court in the years following its ratification, and that the states' regulatory powers under this Amendment are "unfettered by the Commerce Clause" no matter what the extent of the effect of that clause might otherwise be, either now or in the future.



It is a fundamental precept of constitutional construction that meaningless or purposeless interpretations of clauses are to be avoided. (*Marbury v. Madison* (1803) 5 U.S. 137 and *United States v. Butler* (1935) 297 U.S. 1, 65.) Effect is required to be given to every part of the Constitution. (*Wright v. U.S.* (1938) 302 U.S. 583, 588.) This Court has often said that the Twenty-first Amendment and the Commerce Clause must be read in *pari materia*. (See, for example, *California v. La Rue* (1972) 409 U.S. 109.)

In order to give the Twenty-first Amendment its due position in the constitutional scheme of things, the contentions of Midcal and the United States, which would render the Amendment meaningless, must be rejected.

**F. None of the Cases of this Court Cited by Either Midcal or the United States Support their Positions and the Arguments of Both Should Be Rejected**

In addition to the various decisions of this Court cited by Midcal and the United States, none of which support their present positions, there are two other cases cited by Midcal that Petitioner would briefly discuss.

Midcal cites *Jatros v. Bowles*, 143 F.2d 453 (1944), and *Burke v. Ford*, 389 U.S. 320 (1967) for the scope of the federal power to affect liquor within a state's borders. (Midcal Brief, pages 59 and 55) Neither case can be interpreted to support Midcal's position in this case.

In *Jatros v. Bowles*, *supra*, the Sixth Circuit held that under the Emergency Price Control Act, the federal government could regulate the maximum price of liquor sold by the drink. The Emergency Price Control Act was enacted during World War II pursuant to the federal gov-

ernment's war powers. Petitioner would not seriously argue that the Twenty-first Amendment would not generally yield to a valid exercise of the War Power just as other sections of the Constitution often yield.

*Burke v. Ford*, *supra*, is an example of a case where the federal antitrust laws applied because of the absence of any exercise of the states' power under the Twenty-first Amendment. In that case, a private suit was brought under the Sherman Act to enjoin a horizontal division of market territories by all Oklahoma wholesalers where there was no state statute involved. There was no attempt to invalidate a state statute. The conduct involved was not pursuant to any act of the state but was solely the action of private parties. There was no state statute to be preempted. (See *U.S. v. Frankfort Distilleries*, *supra*.)

In the arguments now being made by Midcal and the United States in this matter, both fail to discuss the proper roles of the federal and state governments in keeping with the frequent pronouncement by this Court that a state, in the regulation of liquor within its borders, is "unfettered by the Commerce Clause." They also fail to cite any case of this Court to support the *Rice (Corsetti)* rationale which involved the Twenty-first Amendment and the Commerce Clause which did not involve some other section of the Constitution, such as the First Amendment, the Fourteenth Amendment, or the Export-Import Clause, or foreign commerce, or extraterritorial effects of regulation within a state. These failures are significant! They must be taken as amounting to an abandonment of the erroneous *Rice (Corsetti)* rationale.

Petitioner would urge this Court to reject the preemption theory being advanced by the United States, to reject the "importation" only basis of Midcal's arguments, and the "balancing of interests" test created by the California Supreme Court, and reaffirm the long line of judicial precedent from this Court confirming the state's power to regulate liquor within its borders under the Twenty-first Amendment "unfettered by the Commerce Clause."

# V

**THE CONDUCT OF THE WINE PRODUCERS IN THIS CASE IS NOT "PRIVATELY INITIATED" BUT IS COMPELLED BY THE STATE LEGISLATURE AND ITS DETERMINATION AS TO THE METHOD BY WHICH THE PURPOSES OF THE COMPREHENSIVE LEGISLATIVE SCHEME WILL BE ACCOMPLISHED IS PROPERLY LEFT TO THE LEGISLATURE AND THE STATUTORY PROVISIONS ARE EXEMPT FROM THE SHERMAN ACT UNDER THE "STATE ACTION" DOCTRINE**

At pages 61 through 63 of the Midcal brief it is contended that Congress intended for the repeal of the Miller-Tydings, (50 Stat. 693), and McGuire, (66 Stat. 632), Acts to invalidate all fair trade legislation. Midcal correctly points out that congressional intent is significant in anti-trust issues. However, Midcal then incorrectly interprets the repeal of Miller-Tydings as an indication that Congress intended the antitrust laws to invalidate liquor fair trade laws and as a result comes to a conclusion that the "state action" doctrine does not apply in this case.

Both Houses of Congress made the intended effect on liquor fair trade laws clear. Congress expressly stated that the repeal of Miller-Tydings and McGuire was intended to have no effect on the immunity from the Sherman Act that was enjoyed by state liquor fair trade laws under the

Twenty-first Amendment. The intent of the Senate was made clear in the Report of the Senate Judiciary Committee at the time the McGuire and Miller-Tydings Acts were repealed:

"Liquor will not be affected by the repeal of the fair trade laws in the same manner as other products because the Twenty-first Amendment to the Constitution gives the states broad powers over the sale of alcoholic beverages. Thus, while repeal of the fair trade laws generally will prohibit manufacturers from enforcing resale prices, alcohol manufacturers may do so in states which pass price fixing statutes pursuant to the Twenty-first Amendment." (S. R. Rep. No. 446, 94th Cong., First Sess., p. 2 (1975).)

The House of Representatives also made it clear that it intended liquor fair trade laws to remain exempt from the Sherman Act:

"Some concern was expressed in the hearings before the subcommittee that the repeal of Miller-Tydings and McGuire might impinge in some fashion upon the power of states to regulate liquor traffic under the second section of the Twenty-first Amendment. *No such effect is intended.* . . ." (Emphasis added.)

(H. R. Rep. No. 94-341, 94th Cong., First Sess., p. 3, n.2 (1975).)

The "state action" doctrine is an implied exemption which was developed by this Court in order to further Congress's intent that certain state laws be exempt from the antitrust laws. (*Parker v. Brown* (1943) 317 U.S. 341). Midcal claims that the repeal of Miller-Tydings and McGuire was intended to subject state liquor laws to the Sherman Act prohibitions. But since Congress has stated

that "no such effect is intended", this Court should likewise give the repeal no such effect.

It does not appear that the "state action" exemption has been discussed by this Court in cases involving the state regulation of liquor, as was done in *Rice (Corsetti)*. In *Rice (Corsetti)*, the California Supreme Court rejected the application of the "state action" exemption not because it was a liquor case, but because of its conclusion that the conduct required by the statute was "privately initiated" and that the state did not "supervise" the establishment or amount of the minimum prices required by the state law. Given the scope and breadth of the Twenty-first Amendment, both as interpreted by this Court, its legislative history and the intent of the people of the United States in adopting it, the reason the "state action" exemption has not been discussed by this Court in connection with liquor cases is obvious. It has never been necessary to use it to "save" a state regulatory provision relating to liquor. The scope and breadth of the Twenty-first Amendment is clear and since the state regulatory provisions in this case and in *Rice (Corsetti)* and *Capiscean* are clearly within the state's power to regulate liquor under the Twenty-first Amendment that should end the question.

Both the United States and Midcal argue that the California regulatory provisions do not meet the tests for the application of the doctrine as laid down by this Court in earlier decisions. As stated in Petitioner's Opening Brief and Petition for Writ of Certiorari, the state regulatory

provisions involved here do fit within the "state action" exemption.

Midcal's "privately initiated" conduct argument seems to come basically from the California Supreme Court's language in *Rice (Corsetti)*, 21 Cal.3d at page 444, in which it appears that the California court over-emphasized and misapplied some language in the case of *Cantor v. Detroit Edison Co.*, 428 U.S. 579. It would appear to be illogical to describe conduct of the producers of wine in setting the price of their product to be "privately initiated" when it is required by California laws. In *Cantor*, the failure to qualify for a "state action" exemption was based upon two factors:

(1) The furnishing of free light globes was not part of a comprehensive statutory scheme by the state and therefore obviously not necessary to that scheme's proper operation, and

(2) The State did not require the conduct. The conduct had simply been authorized, in effect, by the approval of the State Public Utilities Commission of a rate schedule which included that feature.

In the case of *Lafayette v. Louisiana Power & Light Co.* (1978) 435 U.S. 389, this Court described the City of Lafayette as an entity falling somewhere between a "state" and a private person. That case does not stand for the proposition that it was the "state" acting. The tie-in sales of electric power with gas which were required of customers by the city, were therefore "privately initiated." This Court sent the case back to the lower court to determine whether or not the privately initiated conduct was "required" by



the state as opposed to simply authorized. If the conduct was required, it was exempt under the "state action" exemption even if it was "privately initiated."

In *Parker v. Brown*, supra, the growers of raisins initiated the action that eventually led to the fixing of the price of raisins. The conduct of the growers was not required since unless a majority of the growers in a district agreed to a price-fixing program, none was in fact instituted. Therefore, the program could be described as optional rather than required. Additionally, although the program initiated by the growers was subject to review by a commission of growers, after that review the matter was again submitted to the growers. If a majority of the growers did not accept the program as modified by the commission, the growers would not be bound under the plan and would not be required to sell at the fixed price. In short, the price-fixing program was privately initiated.

An important consideration in determining whether a "state action" exemption is applicable in any particular situation is whether or not the conduct is required or commanded by the state. *Goldfarb v. Virginia State Bar* (1975) 421 U.S. 773, held that if the conduct is initiated by a private group and is not required by the state, the conduct will not be exempt from the Sherman Act under the "state action" exemption.

However, if private conduct is required by the Legislature and the requirement is part of a comprehensive statutory scheme enacted for the purpose of displacing

competition and replacing it with regulation, the conduct would be exempt from the antitrust laws. As this Court recently stated in *New Motor Vehicles Bd. of Cal. v. Orrin W. Fox Co.* (1978) 439 U.S. 96:

"Appellees next contend that the Automobile Franchise Act conflicts with the Sherman Act, 15 U.S.C. § 1 et seq. They argue that by delaying the establishment of automobile dealerships whenever competing dealers protest, the state scheme gives effect to privately initiated restraints on trade, and thus is invalid under *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951).

"The dispositive answer is that the Automobile Franchise Act's regulatory scheme is a system of regulation, clearly articulated and affirmatively expressed, designed to displace unfettered business freedom in the matter of the establishment and relocation of automobile dealerships. The regulation is therefore outside the reach of the antitrust laws under the "state action" exemption. *Parker v. Brown . . . Bates v. State Bar of Arizona . . . City of Lafayette v. Louisiana Power & Light Co. . .*" Id. at p. 109.

"Appellees also argue conflict with the Sherman Act because the Automobile Franchise Act permits auto dealers to invoke state power for the purpose of restraining intrabrand competition 'This is merely another way of stating that the . . . statute will have an anti-competitive effect. In this sense, there is a conflict between the statute and the central policy of the Sherman Act—our charter of economic liberty. . . . Nevertheless, this sort of conflict cannot itself constitute a sufficient reason for invalidating the . . . statute. For if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the states'

power to engage in economic regulation would be effectively destroyed.' *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 133 (1978)." Id. at pp. 110-111.

At pages 66 through 70 of Midcal's brief, it asserts, as did the California Supreme Court in the *Rice (Corsetti)* case, that price maintenance provisions of the Act are not necessary to the state's regulation of alcoholic beverages and that they are ineffective. Midcal suggests that there are other alternatives available to the Legislature by which it can promote temperance and insure orderly marketing conditions at the retail level.

Petitioner submits that the particular method chosen by the state to regulate a particular matter should be left to the state Legislature. If the state chooses to regulate prices at the retail level to promote temperance, to insure orderly marketing conditions, to protect small businessmen from predatory and monopolistic practices, and if it chooses to regulate the price of liquor from the wholesale to retail level for the purpose of preventing discrimination by wholesalers among similarly situated retailers, and to aid in the enforcement of unfair practices provisions, the Legislature should be allowed to choose the method for regulating prices which, in the wisdom of the Legislature, is deemed to be the best method for accomplishing those ends. In the realm of price-fixing, there are a number of different methods that have been chosen by state Legislatures around the country. Many of the states have chosen to create a monopoly in the distribution and sale of liquor and the state itself is in the business of dispensing liquor. (See Pet. Opening Brief, fn. 1, p. 4.) In many of those

cases, the state has a complete and total monopoly within its borders and sets the prices.

A Legislature could also institute a program that was apparently suggested by the California Supreme Court when it reflected on the lack of supervision over prices, which would include holding price hearings to set prices at wholesale to retail and retail to consumer for the thousands of brands of beer, wine and distilled spirits. With inflation, ever-changing costs, hundreds of producers and with the political considerations that would pervade such hearings, hearings would be very frequent and expensive. The State of Kansas had such a program relating to distilled spirits for a number of years, and this past legislative session abandoned that program and enacted a minimum markup system. (See fn. 15 in section II on "mootness", supra, this brief.)

Another obvious method that could be used to fix the minimum prices for liquor within a state's borders would be to allow the distillers or producers to set the prices of their products at both the wholesale and retail level. This was the system adopted by the California Legislature for distilled spirits at retail, prior to the *Rice (Corsetti)* case. In the case of wine, the producer generally sets the price of wine from wholesale to retail and retail to consumer. However, there are several exceptions wherein a retail brand owner of wine sets his own price at retail and where the wholesaler himself sets his own price. (See fn. 14 in section II on "mootness", supra, this brief.)

In California, at present, the wine statutes still are a mixture of fair trade contracts and "effective price schedules" as illustrated by §§ 24862 and 24866.

Petitioner respectfully submits that any inquiries into the validity of a statute should not include a judicial determination as to the necessity, effectiveness or propriety of the statute as is urged by Mideal and espoused by the California Supreme Court. As this Court stated:

"... And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise. With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. The course of decision in this court exhibits a firm adherence to these principles. Times without number we have said that the Legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of Legislative power." (*Nebbia v. People of the State of New York* (1934) 291 U.S. 502, 537-38.)

California has a comprehensive, detailed scheme of regulation, including the regulation of prices, the basis of which are clearly enunciated by legislative declaration in the California Act as being to promote temperance, encourage orderly marketing conditions and to prevent discrimination and unfair practices. These provisions are an important part of this comprehensive scheme and therefore are exempt from the Sherman Antitrust Act under the "state action" exemption.

The *Parker v. Brown* line of cases focused mainly on three factors which determined the applicability of the "state action" exemption. These factors are (1) the status of the person to be restrained, i.e., is the defendant the state or acting under authority of the state?, (2) to what extent does the state command or supervise the conduct?, (3) the existence and importance of a state policy that results in the restraint. *Princeton Community Phone Book, Inc. v. Bate* (1978) 582 F.2d 706, 716; *Mobilphone v. Commonwealth Telephone Co.* (1978) 571 F.2d 141.

The status of the person who Mideal seeks to restrain in this case is the State Director of Alcoholic Beverage Control. The private conduct involved in this case, just as in the case of lawyers who did not compete by refusing to advertise in *Bates v. State Bar of Arizona*, is the result of an act of the state acting as sovereign. The command from the state is absolute in this case. The licensees have no discretion, they must file price schedules or fair trade contracts. The statutes which compel this conduct are part of a comprehensive state regulatory act. The existence and extreme importance of the policy of state regulation of liquor has been recognized by several Acts of Congress, a constitutional amendment and numerous opinions by this Court. The interest of the state in controlling the sale and use of liquor goes to the core of the state's power to protect the public. The interest in regulating liquor is much greater than the interest of controlling the activities of State Bar members as in *Bates v. State Bar of Arizona* or in controlling the activities of raisin producers as in *Parker v. Brown*. The "privately initiated" conduct aspect



of the "state action" exemption has been overstated by Midcal and the United States and is in conflict with this Court's holdings in the *Cantor*, *Lafayette* and *Fox* cases.

**VI**  
**CONCLUSION**

Based upon over forty years of consistent application of the Twenty-first Amendment by this Court, and by approximately 150 years of continuously recognized state power to regulate liquor within their borders, and the fact that all of the states have based their liquor control provisions upon the interpretations of the Twenty-first Amendment, and the states' traditional role in regulating liquor within their borders, this Court should declare the California regulatory provisions involved to be valid enactments under the Twenty-first Amendment. This Court should further reject the argument that the Twenty-first Amendment should be interpreted to allow a state to only prohibit or restrict imports as contended for by Midcal. This Court should further reject the argument of the United States that Congress may pre-empt a state statute regulating liquor within a state's borders that is enacted under the Twenty-first Amendment.

And finally, this Court should reverse the decision in the instant case and *overrule* the *Rice (Corsetti)* and *Capiscean* cases.

LAW OFFICES OF  
WILLIAM T. CHIDLAW  
A PROFESSIONAL CORPORATION  
*Attorney for Petitioner*

**Exhibits Follow**

**EXHIBITS**

**Exhibit A**

Before the  
Department of Alcoholic Beverage Control  
of the State of California

File 40373

Reg. 13368

In the Matter of the Accusation against  
Grape Empire Wine Co., Inc.  
dba Grape Empire  
140 Hegenberger Loop  
Oakland  
Respondent and Licensee  
under the Alcoholic Beverage Control Act.

**Certification**

State of California }  
County of Sacramento } ss

I, C. E. Cameron, Jr., do hereby certify that I am the duly appointed, qualified and acting Chief Counsel of the Department of Alcoholic Beverage Control of the State of California.

I do hereby further certify that official files of the Department show that the attached accusation was registered by the Sacramento Headquarters Office of said Department on December 5, 1979.

In Witness Whereof, I hereunto affix my signature this 28th day of December, 1979, at Sacramento, California.

/s/ C. E. CAMERON, JR.  
C. E. Cameron, Jr.  
Chief Counsel

A-2

State of California  
Department of Alcoholic Beverage Control

File 40373

Reg. 13368

License Nos. 09, 12, 17, 18, 20

In the Matter of the Accusation against  
Grape Empire Wine Co., Inc.

dba: Grape Empire

Respondent(s)

Premises: 140 Hegenberger Loop, Oakland  
License(s): Beer & Wine Importer,  
Distilled Spirits Importer, Beer & Wine  
Wholesaler, Distilled Spirits Wholesaler &  
Off-sale Beer & Wine

[Received Oct. 4, 1979]

## ACCUSATION

Under Alcoholic Beverage Control Act  
and State Constitution

I hereby complain and accuse the above respondent(s),  
holding the above license (s), based on the following state-  
ment of fact:

## COUNT I

On or about August 30, 1979, the above-named whole-  
sale licensee sold and delivered wines, as listed below, to  
Mary B. Condon and John F. White, dba California Wine  
& Cheese, 2800 Leavenworth Street, San Francisco, a retail  
licensee, at prices other than specified prices filed for said  
wines with the Department, in violation of Section 24862  
of the Business and Professions Code, State of California  
and Rule 101, Title 4, California Administrative Code.

A-3

Invoice #	Wine	Bottle Size	Invoice Case Price	Posted Case Price
6232 1 cs.	Geyser Peak, Fume Blanc .....	750 ml.	\$34.00	\$36.00
6232 1 cs.	Angelo Papagni, Brut Champagne .....	750 ml.	35.00	40.00

## COUNT II

On or about August 3, 1979, the above-named wholesale  
licensee sold and delivered Geyser Peak, Chardonnay  
wines, as listed below, to Victoria Station, Inc., dba  
Quinn's Lighthouse, 51 Embarcadero Cove, Oakland, a  
retail licensee, at prices other than specified prices filed  
for said wine with the department, in violation of Section  
24862 of the Business and Professions Code, State of Cali-  
fornia and Rule 101, Title 4, California Administrative  
Code.

Invoice #	Bottle Size	Invoice Case Price	Posted Case Price
5097 .....	750 ml.	\$38.50	\$40.50
5097 .....	375 ml.	41.00	43.00

## COUNT III

On or about August 24, 1979, the above-named whole-  
sale licensee did give unlawful discounts in connection  
with the sale and delivery of Charles Krug wines to Lucky  
Stores, Inc., a retail licensee, on invoice ~~#5951~~, by allow-  
ing said retail licensee a 15% quantity discount, in viola-  
tion of Sections 24871 and 24878 of the Business and Pro-  
fessions Code, State of California.

## COUNT IV

On or about August 9, 1979, the above-named wholesale  
licensee did give unlawful discounts in connection with



the sale of Ambassador Brut Champagne to Monterey Wine Company, dba California Wine Merchant, 3237 Pierce Street, San Francisco, a retail licensee, on invoice #5347, by allowing said licensee a 10% quantity discount, a F.O.B. cash discount when no such F.O.B. price was contained in the price schedule filed by the winery, and an additional 2% cash discount at time of delivery, said discounts totaling 15.73%, in violation of Sections 24871 and 24878 of the Business and Professions Code, State of California.

Licensee(s) Previous Record: Licensed as a Beer & Wine Importer, Beer & Wine Wholesaler and Off-sale Beer & Wine since 1-14-77. Licensed as a Distilled Spirits Importer and a Distilled Spirits Wholesaler since 8-28-78. No record of any disciplinary action.

(1) That by reason of the foregoing facts, grounds for suspension or revocation of such license(s) exist and the continuance of such license(s) would be contrary to public welfare and morals, as set forth in Article XX, Section 22, State Constitution, and Section 24200(a), Business and Professions Code;

(2) That additional grounds for suspension or revocation under Section 24200 (b) (—) (—), Business and Professions Code, exist in that respondent(s) have violated, or permitted the violation of:

(a) Business and Professions Code Section(s) Count I & II—24862; Count III & IV—24871 and 24878

(b) Title IV, Cal. Admin. Code, Rule(s) Count I & II—Rule 101

(c) Other law: .....

WHEREFORE, I recommend that a hearing be held on this accusation.

Dated this 3 day of October, 1979.

/s/ FRED CORTI  
District Administrator  
Department of Alcoholic  
Beverage Control

Reviewed: /s/

**Exhibit B**

Before the  
Department of Alcoholic Beverage Control  
of the State of California

File 59698  
Reg. 13366

In the Matter of the Accusation against  
Wine Action, Inc.  
1620 Armstrong Avenue  
San Francisco, CA  
Respondent and Licensee  
under the Alcoholic Beverage Control Act.

State of California }  
County of Sacramento } ss

**Certification**

I, C. E. Cameron, Jr., do hereby certify that I am the duly appointed, qualified and acting Chief Counsel of the Department of Alcoholic Beverage Control of the State of California.

I do hereby further certify that official files of the Department show that the attached accusation was registered by the Sacramento Headquarters Office of said Department on December 5, 1979.

In Witness Whereof, I hereunto affix my signature this 28th day of December, 1979, at Sacramento, California.

/s/ C. E. CAMERON, JR.  
C. E. Cameron, Jr.  
Chief Counsel

State of California  
Department of Alcoholic Beverage Control

File 59698  
Reg. 13366  
License Nos. 9, 12, 17, 18, 20

In the Matter of the Accusation against  
Wine Action, Inc.

Respondent(s)

Premises: 1620 Armstrong Avenue  
San Francisco, CA  
License(s): Beer & Wine Importer,  
Distilled Spirits Importer, Beer & Wine  
Wholesalers, Distilled Spirits, Wholesalers  
& Off-Sale Beer & Wine

ACCUSATION

Under Alcoholic Beverage Control Act  
and State Constitution

I hereby complain and accuse the above respondent(s),  
holding the above license(s), based on the following state-  
ment of fact:

COUNT I

On or about July 11, 1979, the above-named wholesale  
licensee did give unlawful discounts in connection with the  
sale and delivery of Cribari and Franzia wines, as described  
below, to Ernest L. Sarlatte, dba Avenue Liquors, 3051-53  
Telegraph Avenue, Berkeley, a retail licensee, by allowing  
said retailer a quantity discount when such quantities pur-  
chased by said retailer did not qualify, for a quantity dis-

count in accordance with the quantity discount schedules on  
file with the Department, in violation of Sections 24862 and  
24878 of the Business and Professions Code, State of  
California and Rule 101, Title 4, California Administrative  
Code.

Invoice Number	Cases Purchased	Brand	Size Bottles	Discount Allowed
16205	....3	Cribari, Sweet Vermouth	1.5 liter	2%
16205	....1	Franzia, Cabernet Sauvignon	1.5 liter	5%
16205	....1	Franzia, Chenin Blanc	1.5 liter	5%
16205	....1	Franzia, French Colombard	1.5 liter	5%

COUNT II

On or about August 2, 1979, the above-named wholesale  
licensee sold and delivered 10 cases of Geyser Peak Chablis  
in 750 ml. size bottles on invoice #16837 to Holiday Inns,  
Inc. 480 Sutter Street, San Francisco, a retail licensee, at  
prices less than specified prices including applicable dis-  
counts filed for said wine in price or quantity discount  
schedules on file with the Department, in violation of Sec-  
tions 24862 and 24878 of the Business and Professions  
Code, State of California and Rule 101, Title 4, California  
Administrative Code.

COUNT III

On or about August 7, 1979, the above-named wholesale  
licensee sold and delivered, as described below, Geyser  
Peak Fume Blanc V in 750 ml. size bottles to Le Central,  
Inc., 453 Bush Street, San Francisco, a retail licensee, at  
a price or quantity discount other than the price or quan-  
tity discount contained in price or quantity discount



schedules on file with the Department, in violation of Sections 24862 and 24878 of the Business and Professions Code, State of California and Rule 101, Title 4, California Administrative Code.

<u>Invoice Number</u>	<u>Invoice Case Price</u>	<u>Posted Case Price</u>	<u>Cases Sold</u>	<u>Quantity Discount Given</u>	<u>Quantity Discount Allowed Per Posted Schedule</u>
16956 .....	\$32.00	\$36.00	6	10%	6%

#### COUNT IV

On or about August 8, 1979, the above-named wholesale licensee sold and delivered, as described below, Wente Bros, Blanc De Noir in 750 ml. size bottles to Edward Dair, dba Avenue Liquors, 3051-53 Telegraph, Berkeley, a retail licensee, at prices other than specified prices filed for said wines with the Department, in violation of Section 24862 of the Business and Professions Code, State of California and Rule 101, Title 4, California Administrative Code.

<u>Invoice Number</u>	<u>Cases Sold</u>	<u>Invoice Price Per Case</u>	<u>Posted Price Per Case</u>
16978 .....	1	\$25.80	\$30.00

Licensee(s) Previous Record: Licensed since September 11, 1978. No previous disciplinary action.

(1) That by reason of the foregoing facts, grounds for suspension or revocation of such license(s) exist and the continuance of such license(s) would be contrary to public welfare and morals, as set forth in Article XX, Section 22, State Constitution, and Section 24200(a), Business and Professions Code;

(2) That additional grounds for suspension or revocation under Section 24200 (b) ( ) ( ), Business and Pro-

fessions Code, exist in that respondent(s) have violated, or permitted the violation of:

(a) Business and Professions Code Section(s) Counts I through IV - 24862 Counts I through III - 24878

(b) Title IV, Cal. Admin. Code, Rule(s) Counts I through IV - Rule 101

(c) Other law:

Wherefore, I recommend that a hearing be held on this accusation.

Dated this 28th day of Sept. 1979.

/s/ Fred Corti  
for District Administrator  
Department of  
Alcoholic Beverage Control

Reviewed: /s/

**Exhibit C**

Before the  
Department of Alcoholic Beverage Control  
of the State of California

File 52016  
Reg. 11123

In the Matter of the Accusation against  
Mission Imports, Inc.  
Mission Cellars Ltd.  
Beverage Marketing Assoc.  
550 S. Mission Road  
Los Angeles  
Respondent and Licensee  
under the Alcoholic Beverage Control Act.

**Certification**

State of California }  
County of Sacramento } ss

I, C. E. Cameron, Jr., do hereby certify that I am the duly appointed, qualified and acting Chief Counsel of the Department of Alcoholic Beverage Control of the State of California.

I do hereby further certify that official files of the Department show that the attached accusation was registered by the Sacramento Headquarters Office of said Department on December 27, 1978.

In Witness Whereof, I hereunto affix my signature this 28th day of December, 1979, at Sacramento, California.

/s/ C. E. CAMERON, JR.  
C. E. Cameron, Jr.  
Chief Counsel

State of California  
Department of Alcoholic Beverage Control

File 52016  
Reg. 11123  
License Nos. 09, 17

In the Matter of the Accusation against  
Mission Imports, Inc.

dba Mission Cellars Ltd.

dba Beverage Marketing Assoc.

Respondent(s)

Premises: 550 S. Mission Road  
Los Angeles

License(s): Beer & Wine Wholesaler;  
Beer & Wine Importer

[Received Dec. 27, 1978]

ACCUSATION

Under Alcoholic Beverage Control Act  
and State Constitution

I hereby complain and accuse the above respondent(s),  
holding the above license(s), based on the following state-  
ment of fact:

COUNT I

On or about November 1, 1978, respondent-licensee did  
sell and cause to be sold to Von's Grocery Co., 10150 Lower  
Azusa Rd., El Monte, an off-sale general licensee, items  
of wine, to-wit: 7000 cases Franzia Champagne (750 ml),  
1000 cases Franzia Cold Duck (750 ml), 3000 cases Franzia  
Spumante (750 ml), and 1000 cases Franzia Pink Cham-

pagne (750 ml), at prices less than the selling prices as  
posted in the then effective price schedule duly filed with  
the Department by Franzia Brothers Winery, on Septem-  
ber 15, 1978.

COUNT II

On or about November 1, 1978, respondent-licensee did  
sell and cause to be sold to Von's Grocery Co., 10150 Lower  
Azusa Rd., El Monte, an off-sale general licensee, items of  
wine, to-wit: 1800 cases of 1/2 gal bottles of Sebastiani Mt.  
French Columbard and 3000 cases of 1/2 gal bottles of  
Sebastiani Mt. Chenin Blanc at prices less than the selling  
prices as posted in the then effective price schedule duly  
filed with the Department by Sebastiani Vineyards, Inc.,  
on October 11, 1978.

COUNT III

On or about November 1, 1978, respondent-licensee did  
sell or cause to be sold to Von's Grocery Co., 10150 Lower  
Azusa Rd., El Monte, an off-sale general licensee, two  
orders of wine, to-wit: 12000 cases of 750 ml bottles Fran-  
zia sparkling wines, and 4800 cases of 1/2 gal bottles of Se-  
bastiani wines, in each instance at prices with allowed  
quantity discounts in excess of the maximum 10% case  
discount.

Licensee(s) Previous Record: So licensed since 1/6/76  
with no record of disciplinary action.

(1) That by reason of the foregoing facts, grounds for  
suspension or revocation of such license(s) exist and the  
continuance of such license(s) would be contrary to public  
welfare and morals, as set forth in Article XX, Section 22,



State Constitution, and Section 24200(a), Business and Professions Code; ALL COUNTS

(2) That additional grounds for suspension or revocation under Section 24200 (a) (b) (—), Business and Professions Code, exist in that respondent(s) have violated, or permitted the violation of:

(a) Business and Professions Code Section(s) 24862—Counts I & II; 24871—Count III

(b) Title IV, Cal. Admin. Code, Rule(s) 101—Counts I & II

(c) Other law: .....

You may, but need not be, represented by counsel at any or all stages of these proceedings.

WHEREFORE, I recommend that a hearing be held on this accusation.

Dated this 11th day of December, 1978.

/s/ KERMIT Q. GREENE  
Department of Alcoholic  
Beverage Control

Reviewed; /s/

**Exhibit D**

No. 51,428

COLBY DISTRIBUTING CO., INC. et al.,

*Appellee,*

v.

MICHAEL C. LENNEN, et al.,

*Appellant.*

Appeal from Shawnee district court, division No. 2; Michael A. Barbara, judge. Reversed in part, affirmed in part. Opinion filed November 14, 1979.

Robert E. Duncan, II, assistant attorney general, argued the cause and Alan F. Alderson, general counsel, John P. Quinlin and David A. Wright, all of the Kansas Department of Revenue, were with him on the brief for the appellants.

Terry G. Paup, of Wichita, and James W. Sargent, of Sargent, Klenda, Haag & Mitchell, of Wichita, argued the cause and Donald Patterson, of Fisher, Patterson, Sayler & Smith, of Topeka, was with them on the brief for the appellees Grant-Billingsley Wholesale Liquor Co., et al.

Robert C. Foulston, of Foulston, Siefkin, Powers & Eberhardt, of Wichita, argued the cause and was on the brief for the intervenor Standard Liquor Corporation.

Payne H. Ratner, Jr., of Ratner, Mattox, Ratner, Barnes & Kinch, P.A., of Topeka, argued the cause and Jim J. Marquez, of Topeka, was with him on the brief for the intervenor Kansas Retail Liquor Dealers Association.

Reid F. Holbrook, of Steineger & Holbrook, P.A., of Kansas City, argued the cause and was on the brief for intervenors Sunflower Sales of Topeka, A-B Sales Co., Inc. and Eastern Distributing Co., Inc.

Patrick L. Connolly, assistant district attorney, argued the cause and Vern Miller, district attorney, and Stuart W. Gribble, assistant district attorney, were with him on the brief for the intervenor State of Kansas, ex rel. Vern Miller.

The opinion of the court was delivered by

Herd, J.: After giving the matter due consideration we hold, by a unanimous court, Chapter 153 of the 1979 Session Laws of Kansas, House Bill 2020, to be constitutional in toto, reversing in part and affirming in part the judgment of the trial court.

This abbreviated opinion announcing the decision of the court will be supplemented by a formal opinion to be filed when it is prepared.

Fromme, J., not participating.

**Exhibit E**

Sacramento, California, Monday, November 20, 1978,  
9:50 A.M.

Senator Foran: I am going to call this meeting to order at the request of Senator Dills' office. Senator Dills has been detained, but he should be here in a little while as we understand it.

I will begin by reading an opening statement that has been prepared by Senator Dills, and I'll read it on his behalf.

AB 935, the Alcoholic Beverage Unfair Practices Act, was heard and approved by this Committee on August 7, 1978. At a later date, the measure was re-referred to this Committee by the Senate Finance Committee for an interim study.

AB 935 was introduced in response to a ruling of the California Supreme Court on May 30, 1978, when the Court found in the case of Baxter Rice -vs- Alcoholic Beverage Control Appeals Board that Section 24755 of the Business and Professions Code violated the Sherman Anti-trust Act.

Section 24755 required that a manufacturer or brand owner of alcoholic beverages file a minimum price schedule for distilled spirits with the Department of Alcoholic Beverage Control, and prohibited an off-sale retail licensee from selling below that posted price.

AB 935 seeks to meet the objections of the California Supreme Court to the old "fair trade" law by establishing a minimum retail price for alcoholic beverages, based upon the cost to a retailer plus a percentage markup to reflect the retailers' necessary expenses.

\* \* \*



No. 79-97

Supreme Court, U.S.  
FILED

JAN 7 1980

In the Supreme Court of the United States

RODAK, JR., CLERK

OCTOBER TERM, 1979

CALIFORNIA RETAIL LIQUOR DEALERS ASSOCIATION,  
PETITIONER

v.

MIDCAL ALUMINUM, INC.

ON WRIT OF CERTIORARI TO THE COURT OF  
APPEAL OF THE STATE OF CALIFORNIA,  
THIRD APPELLATE DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. MCCREE, JR.  
*Solicitor General*

JOHN H. SHENEFIELD  
*Assistant Attorney General*

LAWRENCE G. WALLACE  
*Deputy Solicitor General*

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*Washington, D.C. 20580*

## I N D E X

	Page
Opinions below .....	1
Jurisdiction .....	1
Questions presented .....	2
Statutes and constitutional provisions in- volved .....	2
Interest of the United States .....	4
Statement .....	4
Summary of argument .....	9
 Argument:	
I. The Sherman Act and the Consumer Goods Pricing Act of 1975 preempt the states from requiring wholesalers to maintain producer-set prices for brands of products, in the absence of a state regulatory scheme protective of the pub- lic interest .....	14
A. In the Consumer Goods Pricing Act of 1975 Congress repealed the stat- utory exceptions to the Sherman Act for state-authorized resale price maintenance restraints because it determined that such restraints are undesirable .....	16
B. The State statutory provisions at issue conflict with the Sherman Act and the Consumer Goods Pricing Act of 1975 and, under the Su- premacy Clause, must yield .....	20

Argument—Continued	II	Page
II. The second section of the Twenty-First Amendment did not abrogate Congress' own power to regulate interstate commerce in liquor and did not revoke the Supremacy Clause with respect to regulation of the liquor industry .....		29
A. State regulation of liquor, 1847-1933 .....		30
B. Consideration and approval of the Twenty-First Amendment .....		34
C. Subsequent action by Congress .....		40
D. Judicial interpretation .....		45
E. Recognition of the supremacy of federal policy in this case would not impinge on the basic State interests protected by the Twenty-First Amendment .....		47
Conclusion .....		51

## CITATIONS

### Cases:

<i>Atlantic Refining Co. v. FTC</i> , 381 U.S. 357 .....	18
<i>Bates v. State Bar of Arizona</i> , 433 U.S. 350 .....	7, 15, 24, 25, 28
<i>Bowman v. Chicago &amp; Northwestern Ry. Co.</i> , 125 U.S. 465 .....	36, 50
<i>California v. LaRue</i> , 409 U.S. 109 .....	46
<i>Cantor v. Detroit Edison Co.</i> , 428 U.S. 579 .....	16, 21, 26
<i>Capiscean Corp. v. Alcoholic Beverage Control Appeals Board</i> , 87 Cal. App.3d 996, 151 Cal. Rptr. 492 .....	8

Cases—Continued	III	Page
<i>Castle v. Hayes Freight Lines, Inc.</i> , 348 U.S. 61 .....		50
<i>Castlewood International Corp. v. Simon</i> , 596 F.2d 638 .....		50
<i>Chicago v. Atchison, T. &amp; S. F. Ry. Co.</i> , 357 U.S. 77 .....		50
<i>City of Lafayette v. Louisiana Power &amp; Light Co.</i> , 435 U.S. 389 .....		15
<i>Clark Distilling Co. v. Western Maryland Ry. Co.</i> , 242 U.S. 311 .....		33
<i>Compco Corp. v. Day-Brite Lighting, Inc.</i> , 376 U.S. 234 .....		21
<i>Continental T.V., Inc. v. GTE Sylvania Inc.</i> , 433 U.S. 36 .....		25
<i>Craig v. Boren</i> , 429 U.S. 190 .....	9, 13, 45, 46	
<i>Department of Revenue v. James B. Beam Distilling Co.</i> , 377 U.S. 341 .....		45, 46
<i>Exxon Corp. v. Governor of Maryland</i> , 437 U.S. 117 .....		22, 28
<i>FTC v. Texaco Inc.</i> , 393 U.S. 223 .....		18
<i>Hanf v. United States</i> , 235 F.2d 710, cert. denied, 352 U.S. 880 .....		41
<i>Heublein, Inc. v. South Carolina Tax Comm'n</i> , 409 U.S. 275 .....	39, 45, 47	
<i>Hill v. Florida ex rel. Watson</i> , 325 U.S. 358 .....		21
<i>Hostetter v. Idlewild Bon Voyage Liquor Corp.</i> , 377 U.S. 324 .....	8, 13, 45, 46	
<i>Humphrey's Executor v. United States</i> , 295 U.S. 602 .....		44
<i>James v. United States</i> , 366 U.S. 213 .....		16
<i>Jameson &amp; Co. v. Morgenthau</i> , 307 U.S. 171 .....		41
<i>Leisy v. Hardin</i> , 135 U.S. 100 .....		30, 31



## IV

Cases—Continued	Page
<i>License Cases, The</i> , 46 U.S. (5 How.) 504 .....	31
<i>Martin v. Hunter's Lessee</i> , 14 U.S. (1 Wheat.) 304 .....	44-45
<i>McCormick &amp; Co. v. Brown</i> , 286 U.S. 131..	33
<i>Dr. Miles Medical Co. v. John D. Park &amp; Sons Co.</i> , 220 U.S. 373 .....	17
<i>National Prohibition Cases</i> , 253 U.S. 350..	33
<i>National Society of Professional Engi- neers v. United States</i> , 435 U.S. 679....	16
<i>New Motor Vehicle Board of Cal. v. Or- rin W. Fox Co.</i> , 439 U.S. 96 .....	22, 24, 25
<i>Norman's on the Waterfront, Inc. v. Wheatley</i> , 444 F.2d 1011 .....	26
<i>Northern Pacific Ry. Co. v. United States</i> , 356 U.S. 1 .....	10, 16
<i>Northern Securities Co. v. United States</i> , 193 U.S. 197 .....	27-28
<i>Parker v. Brown</i> , 317 U.S. 341..15, 21, 22, 24, 28	
<i>Perez v. Campbell</i> , 402 U.S. 636 .....	21
<i>Rahrer, In re</i> , 140 U.S. 545 .....	31
<i>Railroad Transfer Service, Inc. v. Chi- cago</i> , 386 U.S. 351 .....	50
<i>Red Lion Broadcasting Co. v. FCC</i> , 395 U.S. 367 .....	44
<i>Rhodes v. Iowa</i> , 170 U.S. 412 .....	31
<i>Rice v. Alcohol Beverage Control Appeals Board</i> , 21 Cal. 3d 431, 146 Cal. Rptr. 585, 579 P.2d 476 .....	6
<i>Schechter Corp. v. United States</i> ("Schechter Poultry"), 295 U.S. 495 .....	40
<i>Schwegmann Bros. v. Calvert Distillers Corp.</i> , 341 U.S. 384 .....	7, 20, 24
<i>Seagram &amp; Sons, Inc. v. Hostetter</i> , 384 U.S. 35 .....	45

## V

Cases—Continued	Page
<i>Sears Roebuck &amp; Co. v. Stiffel Co.</i> , 376 U.S. 225 .....	21
<i>SEC v. National Securities, Inc.</i> , 393 U.S. 453 .....	49
<i>Simpson v. Union Oil Co.</i> , 377 U.S. 13.....	17, 18
<i>Standard Oil Co. v. United States</i> , 221 U.S. 1 .....	27
<i>Stillinovic v. United States</i> , 336 F.2d 862 .....	50
<i>United States v. Frankfort Distilleries, Inc.</i> , 324 U.S. 293 .....	29, 39, 46
<i>United States v. Goldberg</i> , 225 F.2d 180..	50
<i>United States v. Parke, Davis &amp; Co.</i> , 362 U.S. 29 .....	17
<i>United States v. Schrader's Son, Inc.</i> , 252 U.S. 85 .....	17
<i>United States v. Socony-Vacuum Oil Co.</i> , 310 U.S. 150 .....	16
<i>Vance v. W. A. Vandercook Co. (No. 1)</i> , 170 U.S. 438 .....	31
<i>Wisconsin v. Constantineau</i> , 400 U.S. 433 .....	9, 46
<i>Ziffrin, Inc. v. Reeves</i> , 308 U.S. 132 .....	45, 50

## Constitution and statutes:

## United States Constitution:

Article I, Section 8, clause 3, Com- merce Clause .....	passim
Article VI, clause 2, Supremacy Clause .....	passim
Fourteenth Amendment .....	9, 46
Eighteenth Amendment .....	11, 12, 33, 36, 37, 38, 39
Twenty-First Amendment .....	passim

## VI

Constitution and statutes—Continued	Page
Section 2 .....	<i>passim</i>
Section 3 .....	12, 34, 36, 37, 38
Agricultural Marketing Agreement Act of 1937, ch. 296, 50 Stat. 246, 7 U.S.C. 601 <i>et seq.</i> .....	23
Clayton Act, Section 8, 15 U.S.C. 19 .....	29
Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 .....	10, 18
Federal Alcohol Administration Act, 27 U.S.C. 201 <i>et seq.</i> .....	12, 28, 40
27 U.S.C. 205(b) .....	29
27 U.S.C. 205(c) .....	29
27 U.S.C. 205(d) .....	29, 42
27 U.S.C. 205(e) .....	49
27 U.S.C. 205(e), para. 2 .....	42
27 U.S.C. 206(a) .....	42
27 U.S.C. 208 .....	29
27 U.S.C. 208(b) .....	42
Liquor Enforcement Act of 1936, ch. 815, 49 Stat. 1928 (18 U.S.C. 1262) .....	30
Sections 1-12 .....	43
Section 3 .....	3
McGuire Act, Pub. L. No. 542, 66 Stat. 631 .....	18
Miller-Tydings Act, ch. 690, Tit. VIII, 50 Stat. 693 .....	18, 23
National Industrial Recovery Act, ch. 90, 48 Stat. 195, repealed, Pub. L. No. 89- 554, 80 Stat. 648 .....	40
National Labor Relations Act, 29 U.S.C. 151 <i>et seq.</i> .....	49
National Prohibition Act, ch. 85, 41 Stat. 305, repealed, ch. 740, 49 Stat. 872.....	33

## VII

Constitution and statutes—Continued	Page
Securities Act, 15 U.S.C. 77a <i>et seq.</i> .....	49
Sherman Act, Section 1, 15 U.S.C. 1 <i>et seq.</i> .....	2, 7, 15
Webb-Kenyon Act, ch. 90, 37 Stat. 699, 27 U.S.C. 122 .....	2, 30, 32
Webb-Kenyon Act, ch. 740, Section 202, 49 Stat. 877 .....	3, 43
Wilson Act, ch. 728, 26 Stat. 313, 27 U.S.C. 121 .....	31
Pub. L. No. 95-473, 92 Stat. 1409 (1978) (to be Codified at 49 U.S.C. 10922(a) (2) .....	49-50
Cal. Bus. & Prof. Code (West 1964 and Cum. Supp. 1979) :	
Section 24749 .....	47
Section 24750.5 (West Supp. 1979) ..	3
Section 24752 .....	3, 5, 23
Section 24862 (West Supp. 1979).....	5
Section 24864 (West Supp. 1979) ....	5
Section 24866 .....	4
Section 24866(a) .....	5
Section 24869 .....	5
Section 24870 .....	3
Section 24880 (West Supp. 1979) ....	5
Miscellaneous:	
1 P. Areeda and D. Turner, <i>Antitrust Law</i> (2d ed. 1978) .....	26
California Department of Finance, <i>Alco- hol and the State: A Reappraisal of California's Alcohol Control Policies</i> (1974) .....	48
49 Cong. Rec. 4291-4292 (1913) .....	33

## VIII

Miscellaneous—Continued	Page
76 Cong. Rec. (1933):	
p. 4002 .....	40
p. 4005 .....	40
p. 4130 .....	36
pp. 4138-4139 .....	34
p. 4140 .....	35, 40
p. 4141 .....	35, 37
p. 4142 .....	37
p. 4143 .....	36, 37
p. 4144 .....	36
p. 4145 .....	36
p. 4146 .....	36
pp. 4147-4148 .....	36
p. 4149 .....	40
p. 4156 .....	36
p. 4170 .....	35
p. 4171 .....	36
p. 4172 .....	36, 37, 38
p. 4173 .....	36
p. 4174 .....	36
p. 4176 .....	36
p. 4177 .....	36
p. 4219 .....	35, 36
p. 4220 .....	36
p. 4225 .....	37
p. 4226 .....	36, 37
p. 4227 .....	36
p. 4228 .....	36
pp. 4774-4776 .....	36
79 Cong. Rec. (1935):	
p. 11712 .....	43
p. 11714 .....	43

## IX

Miscellaneous—Continued	Page
<i>Constitutionality of Proposed Legislation</i>	
<i>Divesting Intoxicating Liquors of their</i>	
<i>Interstate Character in Certain Cases,</i>	
30 Op. Att'y Gen. 88 (1913) .....	33
H.R. Rep. No. 94-341, 94th Cong., 1st	
Sess. (1975) .....	18-19, 44
H.R. Rep. No. 1461, 62d Cong., 3d Sess.	
(1913) .....	32
H.R. Rep. No. 1542, 74th Cong., 1st Sess.	
(1935) .....	29, 40, 41, 42, 43
H.R. Rep. No. 1601, 74th Cong., 1st Sess.	
(1935) .....	3
Kerr, <i>The Webb Act</i> , 22 Yale L.J. 567	
(1913) .....	31
Moreland Commission, Study Paper No. 5,	
"Resale Price Maintenance in the Liquor	
Industry" .....	48
Moreland Commission, Report and Recom-	
mendation No. 3, "Mandatory Resale	
Price Maintenance" .....	48
S. Rep. No. 94-466, 94th Cong., 1st Sess.	
(1975) .....	19, 44
S. Rep. No. 1022, 72d Cong., 2d Sess.	
(1933) .....	34
S. Rep. No. 1060, 62d Cong., 3d Sess.	
(1913) .....	33
S. Rep. No. 1215, 74th Cong., 1st Sess.	
(1935) .....	41, 42
S. Rep. No. 1330, 74th Cong., 1st Sess.	
(1933) .....	43
S. Rep. No. 1784, 75th Cong., 3d Sess.	
(1938) .....	30
S. Rep. No. 2090, 85th Cong., 2d Sess.	
(1958) .....	50



**In the Supreme Court of the United States**

OCTOBER TERM, 1979

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No. 79-97

CALIFORNIA RETAIL LIQUOR DEALERS ASSOCIATION,  
PETITIONER

v.

MIDCAL ALUMINUM, INC.

---

*ON WRIT OF CERTIORARI TO THE COURT OF  
APPEAL OF THE STATE OF CALIFORNIA,  
THIRD APPELLATE DISTRICT*

---

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**

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**OPINIONS BELOW**

The opinion of the court of appeal (Pet. App. A-1 to A-10)<sup>1</sup> is reported at 90 Cal. App. 3d 979.

**JURISDICTION**

The opinion of the court of appeal was entered on March 26, 1979. The California Supreme Court denied a timely petition for hearing on May 24, 1979. The petition for a writ of certiorari was filed on

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<sup>1</sup> "Pet. App." refers to the appendix to the petition for a writ of certiorari. "A." refers to the Joint Appendix to the briefs filed in this Court.

July 19, 1979, and was granted on October 1, 1979. The jurisdiction of this Court rests on 28 U.S.C. 1257(3).

#### QUESTIONS PRESENTED

1. Whether the California statutory prohibition of intrabrand price competition in the market for wholesale wine is invalid under the Supremacy Clause, and thus unenforceable, because it conflicts with the Sherman Act, 15 U.S.C. 1 *et seq.*

2. Whether Section 2 of the Twenty-First Amendment modifies the Supremacy Clause, so that a state statute regulating alcohol prevails over conflicting general federal law.

#### STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 8, Clause 3 of the United States Constitution and the Twenty-First Amendment of the United States Constitution are set forth in the appendix printed as part of petitioner's brief (A-1). Also set forth in that appendix are the Sherman Act, 15 U.S.C. 1 and 2 (A-9), the Webb-Kenyon Act, 27 U.S.C. 122 (A-10), and Sections 24862 and 24866 of Chapter 11 (Wine Fair Trade Contracts and Price Posting) of the California Business and Professions Code (West 1964 and Cum. Supp. 1979) (A-10 to A-12).

Article VI, Clause 2 of the United States Constitution provides in pertinent part:

This Constitution, and the laws of the United States which shall be made in Pursuance there-

of \* \* \* shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Sections 24870, 24750.5, and 24752 of the California Business and Professions Code (West 1964), provide in pertinent part:

§ 24750.5. *Fair trade contracts for wine; authority.* Fair trade contracts for wine have been and shall continue to be authorized by this chapter. Such contracts shall be governed by the applicable provisions of this chapter and Chapter 11.

§ 24752. *Fair trade contracts; price cutting; unfair competition; right of action.* Willfully and knowingly advertising, offering for sale, or selling any alcoholic beverage at less than the price stipulated in any contract entered into pursuant to this chapter, or in any effective minimum retail price schedule filed with the department \* \* \*, whether the person \* \* \* is or is not a party to the contract, is unfair competition and is actionable at the suit of any person damaged thereby.

§ 24870. *Basic selling and resale price; selling price; number of prices for same brand.* \* \* \* The selling price contained in any schedule of selling prices shall be the same as the resale price contained in an effective fair trade contract and schedule of resale prices filed by the same licensee. \* \* \*.

### INTEREST OF THE UNITED STATES

The United States has primary responsibility for enforcement of the antitrust laws in the unregulated sector of our economy, and it seeks to promote the congressional policy of encouraging competition, where compatible with other statutory goals, in regulated industries. The United States recognizes the authority of the states to regulate their economies in a manner which restrains competition to some extent. It nonetheless has a strong interest in assuring that the states are not allowed simply to reject the competitive balances drawn by Congress between the interests of consumers, distributors, and producers of goods which travel in interstate commerce.

The United States is also responsible for enforcement of the Federal Alcohol Administration Act and the many other federal regulatory statutes (*e.g.*, securities and labor laws) which apply to the liquor industry as well as all other interstate commerce. The United States thus has an interest in assuring that these laws will not be subject to *de facto* revocation by the states absent action by Congress subordinating its own power over interstate commerce in liquor to that of the states.

### STATEMENT

1. Section 24866 of the California Business and Professions Code (West 1964) requires, *inter alia*, that each wine producer file (or "post") with the State Department of Alcoholic Beverage Control ("the De-

partment") a schedule of resale prices and executed resale price maintenance contracts ("fair trade" contracts) for each brand of wine it owns or controls. The contract and schedule for each brand must contain the same prices (Cal. Bus. & Prof. Code § 24870 (West 1964)) and the same information on brand identity and terms of sale (§ 24869).

Wine wholesalers are, with no exceptions here relevant, forbidden to sell wine to retailers at any price other than that specified in an effective price schedule or fair trade contract (§ 24862 (West Cum. Supp. 1979));<sup>2</sup> and a violation of this provision subjects the wholesaler to any of a number of sanctions: fines, suspension of its license, license revocation (§ 24880 (West Cum. Supp. 1979)) and possibly an action for damages by an injured party (§ 24752 (1964)). When, for any reason, a wine producer has failed to establish prices, wholesalers are required to do so by posting a resale price schedule for the brands concerned (§ 24866(a) (1964)). A retail price schedule filed by one distributor binds all other wholesalers selling within the same trading area (Pet. App. A-9).

2. Respondent Midcal Aluminum is a wholesale distributor of Gallo wine in the southern trading area of the state. It sold 27 cases of Gallo wine to one

<sup>2</sup> Section 24862 requires compliance "unless otherwise provided in this chapter." Wholesalers in the "mountain area"—one of three trading areas (mountain, northern, and southern) defined in the Code § 24864 (West Cum. Supp. 1979))—are permitted to charge more, but not less, than the wholesale price set by the producer.



retailer, also in the southern trading area, at prices below those posted by Gallo with the Department (A. 16-17, 19). It also sold to other southern trading area retailers an unstated number of cases of wine for which no fair trade contract or resale price schedule had been posted (A. 17, 19). The Department brought administrative proceedings against Midcal charging these sales as violations of Section 24862 of the Code (A. 16-18). Midcal stipulated in that proceeding that the facts as charged were true, and agreed to accept sanctions subject to a determination of the validity of the statute (A. 19-20). It then sought mandamus from the appropriate state Court of Appeal (A. 3-11). Petitioner, the California Retail Liquor Dealers Association, a trade association of retail liquor stores, intervened in opposition (Pet. App. A-2 n.2).

3. The Court of Appeal held that the price posting provisions "result in price fixing in wine" contrary to the Sherman Act (Pet. App. A-5), and that the statute was accordingly invalid and unenforceable. It relied on a recent California Supreme Court decision that held a comparable price-posting statute for distilled spirits invalid under the Sherman Act. *Rice v. Alcoholic Beverage Control Appeals Board*, 21 Cal. 3d 431, 146 Cal. Rptr. 585, 579 P. 2d 476 (1978) ("*Rice*") (reprinted at Pet. App. C-1 to C-39).

In *Rice*, the California Supreme Court held that "the conduct of the liquor producers" in filing their retail prices with the state liquor department was a change "of form rather than substance" (Pet. App.

C-6) from the use of resale price maintenance contracts, and as such constituted the price fixing proscribed by Section 1 of the Sherman Act. And it held, quoting *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 386 (1951), that "[t]he fact that a state authorizes the price fixing does not, of course, give immunity to the scheme \* \* \*" (Pet. App. C-9).

The California Supreme Court rejected the Department's contention that the imposition of minimum retail prices here, unlike in *Schwegmann*, was "a sovereign act of the state exempt from the Sherman Act" (Pet. App. C-9). It reviewed this Court's "state action" decisions (Pet. App. C-11 to C-16), and distilled from them the rule that the state could not create Sherman Act immunity by "compel[ling] private persons to engage in anticompetitive conduct" where the state "essentially exercises no control over the substance of their actions" (Pet. App. C-16). It noted (Pet. App. C-17) that in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), this Court buttressed its state-action finding by observing that the Arizona Supreme Court's "pointed re-examination" of disciplinary rules in enforcement proceedings (433 U.S. at 362) "reduce[d] the likelihood that federal anti-trust policy would be unnecessarily subordinated to state policy." Under the California statute, by contrast, the State simply enforced prices set by private parties "without regard to any actual or potential anticompetitive effect; the state's role is restricted to enforcing the prices specified by the producers" (Pet.

App. C-18).<sup>3</sup> The California Supreme Court thus concluded that it "would be extending the decisions of [this] Court beyond their intended design if we were to hold \* \* \* that this scheme is immune from the Sherman Act" (Pet. App. C-18).

The court below, in following this holding, held that there was no significant distinction between wine and distilled spirits, rejected the argument that protection of the domestic wine industry was a justification for the statute, and concluded that this statute, like the one in *Rice*, ran afoul of the Sherman Act (Pet. App. A-6 to A-7).<sup>4</sup>

Finally, the Court of Appeal declined to consider petitioner's argument that the authorization for state liquor regulation contained in the Twenty-First Amendment worked a pro tanto repeal of the Supremacy Clause (Pet. App. A-7 n.4), holding that it was bound by the California Supreme Court's holding on that issue in *Rice*. In that case, the California Supreme Court relied on this Court's holdings that the Twenty-First Amendment did not repeal altogether the Commerce Clause as a restriction on the state's power to regulate interstate commerce in alcohol,<sup>5</sup>

<sup>3</sup> It also held, as a matter of state law, that the Department's power to excuse a retailer from compliance with a producer-established retail price "for good cause" was not a general power to regulate prices (Pet. App. C-10 to C-11).

<sup>4</sup> *Rice* had previously been applied to the wine statute with respect to retail sales to consumers in *Capiscean Corp. v. Alcoholic Beverage Control Appeals Board*, 87 Cal. App. 3d 996, 151 Cal. Rptr. 492 (1979) (Pet. App. D-1 to D-4).

<sup>5</sup> *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964).

and that it did not repeal other constitutional provisions, such as the Fourteenth Amendment, that restrict the states' powers (Pet. App. C-21 to C-27).<sup>6</sup> Balancing the policy of the Twenty-First Amendment and the State's interest in this type of alcohol sales regulation against the policies of the Sherman Act, enacted as an exercise of federal power under the Commerce Clause, the *Rice* court concluded that the federal interest should prevail (Pet. App. C-27 to C-39). In reaching this conclusion it noted, *inter alia*, that the price maintenance policies of the distilled spirits statute "clearly" conflicted with the policies of the Sherman Act (*id.* at C-34) and that the purposes for which the state statute was enacted—promotion of temperance and orderly marketing conditions—could be better served by laws that did not run afoul of the Sherman Act (*id.* at C-34 to C-39).

The California Supreme Court declined to review the decision of the Court of Appeal in this case (Pet. App. B).

#### SUMMARY OF ARGUMENT

The question presented in this case is whether California may require all wine wholesalers to charge for a brand of wine the price determined by the wine's producers, without providing for any state regulatory mechanism to protect the public interest from the evils associated with such restraints on price competition. The state court correctly held that such a bare pro-

<sup>6</sup> *Craig v. Boren*, 429 U.S. 190 (1976); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971).



hibition of price competition is inconsistent with the Sherman Act and hence invalid under the Supremacy Clause.

The central and unequivocal policy of the Sherman Act is the preservation of price competition at every level of production and sales. This policy, which this Court has described as producing "the best allocation of our economic resources" (*Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 4 (1958)), was reaffirmed and made the unequivocal federal policy with respect to resale price maintenance restraints when Congress enacted the Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801, which repealed federal laws that had permitted exemptions from the Sherman Act for state laws authorizing such restraints under certain conditions. Congress repealed those laws because it concluded that resale price maintenance restraints did not in fact aid small independent businessmen—the traditional justification for such schemes—and had the undesirable effects of artificially raising prices paid by consumers and facilitating restraints on interbrand competition.

Under this Court's decisions, the states are free to protect the public interest by regulating their economies even when some anticompetitive effects may result. Here, however, that principle is inapplicable because California has simply instructed wine producers to set prices, wholly within their own discretion, at which otherwise independent wholesalers may sell their wine, and the State's role is merely to enforce this price-fixing scheme. Since the statutory provisions at issue here are thus no more than a pro

tanto repeal of the Sherman Act, they are invalid under the Supremacy Clause unless, contrary to our submission, the Twenty-First Amendment is an impediment in this case to the ordinary operation of the Supremacy Clause on state laws that conflict with federal policies.

## II

Section 2 of the Twenty-First Amendment declares that the transportation or importation of liquor into a state in violation of its laws is "prohibited." This simple provision was enacted in tandem with repeal of the Eighteenth Amendment, and its legislative history indicates that it reflects the Seventy-Second Congress' rejection both of the role Congress had taken on as enforcer of Prohibition under the Eighteenth Amendment and of the holdings in certain decisions of this Court that the Commerce Clause in itself limits inherent state police powers over liquor that has passed through interstate commerce. Congress had previously sought to overcome those decisions through passage of the Wilson Act and the Webb-Kenyon Act, but it deemed the enactment of a Constitutional amendment a more secure means of protecting traditional state powers over the local liquor trade. The legislative history of the Twenty-First Amendment does not, however, reflect an intent on the part of Congress to subordinate to the powers of state legislatures its own legislative powers under the Constitution as they existed prior to the Eighteenth Amendment.



Nor is such an intent reflected in the rejection of a proposed third section for the Twenty-First Amendment granting Congress concurrent power "to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold." Although diverse views were expressed regarding the powers of Congress over the regulation of the local liquor trade either with or without this additional section, the dominant theme expressed by the opponents of Section 3 was that it presaged a repetition, at least with respect to regulation of saloons, of the unfortunate consequences of federal regulation of local mores concerning drinking under the Eighteenth Amendment.

The Twenty-First Amendment does not in terms restrict the pre-Eighteenth Amendment legislative powers of Congress except the power to require the "transportation or importation" of liquor into a state in violation of its laws. And since the apparent intent of those who adopted the Twenty-First Amendment was simply to repeal the grant of power made by the Eighteenth Amendment—power that was unconstrained by the limits of the Commerce Clause—and to eliminate the negative implications of the Commerce Clause for state legislative authority, Congress should not be deemed to have restricted its own constitutionally conferred legislative powers wholly by unstated implication.

This reading of the Amendment is supported by the enactment by a subsequent Congress, little more than two years later, of the Federal Alcohol Administration Act, 27 U.S.C. 201 *et seq.*, which contains pro-

visions that expressly override contrary state law. Moreover, that Act was passed only two days after Congress formally re-enacted the Webb-Kenyon Act, a statute that removed implied Commerce Clause restrictions on state legislative authority in a manner that this Court has found to be "constitutionaliz[ed]" in the Twenty-First Amendment. *Craig v. Boren*, 429 U.S. 190, 205-206 (1976).

This Court has not directly addressed the question posed in this case, but it has emphasized that the Twenty-First Amendment did not repeal the Commerce Clause *pro tanto* with respect to liquor and that each constitutional provision "must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964). Where, as here, Congress has exercised its constitutionally authorized powers, the Supremacy Clause can only mean that its enactments are the supreme law of the land, notwithstanding any state law to the contrary.

In the present case, the determination by the California state court that the wine-pricing provision at issue here is invalid because it directly contravenes federal antitrust policy in no way affects the basic state interests addressed by Section 2 of the Twenty-First Amendment. California remains free to promote, tolerate, or prohibit the liquor trade, and even to seek to promote temperance through a policy of high liquor prices, so long as it does not do so by means that directly and unnecessarily conflict with

federal law. A contrary determination would have an unsettling effect on numerous other federal statutes—such as the labor laws and the securities laws—that reach the liquor industry, without any compensating gain in advancing the essential purpose of the Twenty-First Amendment.

### ARGUMENT

#### I. THE SHERMAN ACT AND THE CONSUMER GOODS PRICING ACT OF 1975 PREEMPT THE STATES FROM REQUIRING WHOLESALERS TO MAINTAIN PRODUCER-SET PRICES FOR BRANDS OF PRODUCTS, IN THE ABSENCE OF A STATE REGULATORY SCHEME PROTECTIVE OF THE PUBLIC INTEREST

The question presented in this case is whether California may require all wine wholesalers to charge for a brand of wine the price determined by the wine's producer. The California state court held that it may not. It properly acknowledged that a state law that is fundamentally inconsistent with federal law is unenforceable under the Supremacy Clause, and it correctly determined that the statutory scheme at issue here is inconsistent with the Sherman Act because it is a bare prohibition of conduct—price competition—that the Sherman Act promotes. Hence it is invalid under the Supremacy Clause.<sup>7</sup>

<sup>7</sup> This case does not directly present any question of federal antitrust liability of any persons for compliance with the California statutory scheme. We therefore comment only briefly on our understanding of how the governing legal

principles concerning such liability would apply in this context.

The source of the competitive restraint underlying this case is California's clearly articulated statutory prohibition of price competition. The State requires wine producers to establish a wholesale price for their wine, file it with the State Department of Alcoholic Beverage Control, and publish it in a trade journal. Wholesalers are then required to charge that price. The statute eliminates wholesale price competition by requiring that all wholesalers charge the same price.

The only private action in this context is the producer's decision to select the one price which all wholesalers must charge and the wholesalers' adherence to that price. In the absence of predation, an individual businessman's selection of one price rather than another does not in itself "restrain competition" as that phrase is used in antitrust law. Competition is eliminated by the State's requirement that all wholesalers adhere to that price, not by any discretionary private action of the producers and wholesalers (except for their failure to contest the validity of the state law).

Because Section 1 of the Sherman Act applies to restraints of trade "operat[ing] by force of individual agreement or combination" (*Parker v. Brown*, 317 U.S. 341, 350 (1943)), not to "act[s] of government by the State as sovereign" (*City of Lafayette v. Louisiana Power and Light Co.*, 435 U.S. 389, 413 (1978)) or to private conduct compelled by a state policy that itself eliminates competition (*Bates v. State Bar of Arizona*, 433 U.S. 350 (1977)), no question of any Sherman Act violation arises if the state statutory scheme at issue satisfies the requirements outlined in those cases.

On the other hand, in the absence of the pertinent state statutes, the conduct at issue here would, at least by inference, be a concerted resale price maintenance scheme prohibited by the Sherman Act (see pages 23-29, *infra*). If, as we contend, the state statutes must yield to the Sherman Act under the Supremacy Clause (and are not saved by the Twenty-First Amendment), the prohibition of the Sherman Act similarly applies to that conduct. However, until the facially valid state statutes commanding that conduct are judicially nullified, there would, in our view, be no liability under the Sherman Act for conduct conforming to the state



**A. In The Consumer Goods Pricing Act Of 1975 Congress Repealed The Statutory Exceptions To The Sherman Act for State-Authorized Resale Price Maintenance Restraints Because It Determined That Such Restraints Are Undesirable**

The central and unequivocal policy of the Sherman Act is competition. *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 5 (1958). Agreements fixing or even "tampering" with price—"the central nervous system of the economy" (*United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 n.59 (1940))—are per se unlawful.<sup>8</sup> The preservation of price competition at every level of production serves both economic and socio-political goals of Congress; for, as this Court has stated (*Northern Pacific Ry. Co. v. United States*, *supra*, 356 U.S. at 4), the preservation of price competition enables independent businessmen to make the personal economic calculations that will best service their interests and, through the operation of free markets, produces "the best allocation of our

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statutory scheme—at least if performed in good faith reliance on the apparent compulsion of state law. See *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 592 (1976); *id.* at 614 n.6 (Blackmun, J., concurring). Cf. *James v. United States*, 366 U.S. 213, 221-222 (1961) (opinion of Warren, C.J., joined by Brennan and Stewart, JJ.); *id.* at 241 (opinion of Clark, J.); *id.* at 241-248 (opinion of Harlan, J., joined by Frankfurter, J.).

<sup>8</sup> The direct injury to the public is so great, and the prospect of some coincidental and indirect benefit so dim, that no justification in economics or social policy is permitted in defense of a charge of price-fixing. *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692-697 (1978).

economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions."

The Sherman Act thus prohibits producers from setting the prices at which independent wholesalers and retailers may sell their products. *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 399-400 (1911). Such vertical price-fixing strikes at both valuable price competition and business independence, threatening to "destroy the dealers' independent discretion through restrictive agreements." *United States v. Schrader's Son, Inc.*, 252 U.S. 85, 99 (1920). Producers may not circumvent this prohibition by calling a sale a "consignment" where the buyer-consignee is in truth an independent businessman bearing the risk of loss. *Simpson v. Union Oil Co.*, 377 U.S. 13, 17-18, 20-22 (1964). They may not impose unwritten agreements on independent wholesalers and retailers by conditioning future sales on compliance with producer-set prices. *United States v. Parke, Davis & Co.*, 362 U.S. 29, 45 & n.6 (1960). They may not compel independent retailers to maintain resale prices through other coercive means, such as termination of leases of non-cooperating retailers. *Simpson v. Union Oil*, *supra*, 377 U.S. at 15, 16. Such "agreements," coercively imposed by large producers on independent distributors, strike at the right of businessmen to determine the price at which they will sell their goods, "the only power they have



to be wholly independent businessmen, whose service depends on their own initiative and enterprise." 377 U.S. at 21.<sup>9</sup>

Indeed, after many years of allowing the states to authorize resale price maintenance agreements under certain conditions,<sup>10</sup> Congress repealed those authorization statutes in the Consumer Goods Pricing Act of 1975,<sup>11</sup> which reasserted the primacy of a federal policy promoting price competition and distributor pricing autonomy. In doing so, Congress carefully reviewed experience with resale price maintenance and concluded that such arrangements should not be permitted to intrude into the relationships between producers, distributors, and consumers.

Specifically Congress found that resale price maintenance, like most other price-fixing, produces "little but artificially high prices for consumers" and, worse, facilitates horizontal price fixing.<sup>12</sup> H.R. Rep. No. 94-

<sup>9</sup> The economic balance struck by Congress in favor of protecting the decision-making autonomy of distributors against manufacturer efforts to control their business practices is reflected in the Federal Trade Commission Act as well as the Sherman Act. See *Atlantic Refining Co. v. FTC*, 381 U.S. 357, 368 (1965); *FTC v. Texaco Inc.*, 393 U.S. 223, 226-227 (1968).

<sup>10</sup> The Miller-Tydings Act, ch. 690, Tit. VIII, 50 Stat. 693 (1937) and the McGuire Act, Pub. L. No. 542, 66 Stat. 631 (1952), both repealed by the Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801.

<sup>11</sup> See note 10, *supra*.

<sup>12</sup> Resale price maintenance enables manufacturers, wholesalers, and retailers to exchange price information in ways that might otherwise violate the antitrust laws because of

341, 94th Cong., 1st Sess. 1 (1975). Moreover, it found that the traditional justification for resale price maintenance, the protection of "Mom and Pop" retail stores, "will no longer withstand scrutiny." *Ibid.* Notwithstanding extensive experience with resale price maintenance, there was no economic evidence to show that it actually protected or promoted small retail stores. For example, non-fair-trade states did not suffer more predatory pricing or higher rates of small store failures than did states with resale price maintenance. *Id.* at 4; S. Rep. No. 94-466, 94th Cong., 1st Sess. 3 (1975). Indeed, Congress was concerned that resale price maintenance itself may have discouraged small, independent businessmen from attempting to enter the retail sales market by denying them the most common device to obtain a toe-hold in a market: aggressive price competition. H.R. Rep. No. 94-341, *supra*, at 4-5. Weighed along with all of this was the unquestioned effect of resale price maintenance to raise consumer prices and to deny consumers the choice between buying goods at relatively low prices and buying them from retailers who offer more services, convenience, or other intangible advantages. *Id.* at 3, 4. Congress therefore con-

their tendency to facilitate horizontal price-fixing agreements. Moreover, by concentrating price setting power in the hands of a few manufacturers, rather than thousands of wholesalers and retailers, resale price maintenance encourages price leadership and discourages aggressive price competition. See H.R. Rep. No. 94-341, 94th Cong., 1st Sess. 3-4 (1975). The California courts found a lack of horizontal price competition in the liquor industry in the State exactly because of these two effects of resale price maintenance. *Rice, supra* (Pet. App. C-31 to C-34).

cluded that resale price maintenance agreements, "in direct violation of the system of free competition which the antitrust laws are designed to promote" (*id.* at 2), should no longer enjoy immunity from the operation of the federal antitrust laws.

Congress having spoken, it follows, under the ordinary Supremacy Clause principle that a state may not authorize what Congress has validly prohibited, that the states are preempted from authorizing optional resale price maintenance restraints. *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951). State imposition of a mandatory resale price maintenance arrangement, such as is involved in this case, is, if anything, even more inconsistent with and inimical to Congress's clearly stated policy. The remaining question (other than the Twenty-First Amendment issue, discussed in point II, *infra*) is whether there is nonetheless an impediment to the ordinary operation of the Supremacy Clause here merely because of the mandatory nature of the state statutes at issue.

**B. The State Statutory Provisions At Issue Conflict With The Sherman Act And The Consumer Goods Pricing Act Of 1975 And, Under the Supremacy Clause, Must Yield**

In the face of the comprehensive federal policy of encouraging price competition and preserving wholesaler and retailer independence of producers and manufacturers, California has simply prohibited all intrabrand price competition and subjected wholesalers and retailers to the absolute power of pro-

ducers in determining liquor resale prices in the state of California. The state statutes serve only to prevent Congress' policy of resale price competition from operating on interstate commerce in liquor in California—they reject the balance drawn by Congress between the interests of consumers, producers and distributors and thus amount to nothing more than a form of pro tanto repeal of the Sherman Act. The California statutes are accordingly preempted under established Supremacy Clause analysis.<sup>13</sup>

As this Court recognized in *Parker v. Brown*, 317 U.S. 341, 350 (1943), the question of preemption is a federal statutory question of whether Congress has exercised its "familiar \* \* \* constitutional power to suspend state laws." See *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 618-622 (1976) (Stewart, J., dissenting). *Parker* involved a suit by a raisin packer to enjoin enforcement of a California regulatory program

<sup>13</sup> Indeed, the Court has invalidated far less direct interferences by the states with balances drawn between conflicting economic groups or interests by Congress. See, *e.g.*, *Hill v. Florida ex rel. Watson*, 325 U.S. 538, 541-542 (1945) (state law requiring state certification of union representative deemed to interfere with employee-employer balance struck by Congress); *Perez v. Campbell*, 402 U.S. 637 (1971) (state law which allowed judgment creditor to compel suspension of debtor's driver's license deemed to upset the balance between creditor and debtor interests reflected in the federal bankruptcy laws); *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964) and *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964) (state unfair competition laws upset congressional balance drawn between granting monopoly awards for innovation and promoting competition as reflected in the federal patent laws).



limiting the quantities of raisins which growers could sell on the open market. The regulation was similar to that involved in the instant case, in that both had the effect of raising the price of the commodity affected. The difference is that, under the regulatory plan involved in *Parker*, the supply restrictions had to be designed by a committee appointed by the State Director of Agriculture, and they did not take effect until approved by a vote of the growers in the district and by the State Agricultural Prorate Advisory Commission.<sup>14</sup> Under the statute involved here, the price maintenance schedule becomes effective without approval or review by anyone other than the producer who sets the price.

The essence of the Court's holding in *Parker* was that the Sherman Act was not intended to preclude states from regulating their economy, even if those regulations produced some anticompetitive results. See *New Motor Vehicle Board of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96, 111 (1978); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 133 (1978). The Court noted that the Sherman Act was directed at private economic power, and at abuses of that power by individuals and corporations. 317 U.S. at 351. A system of regulation such as that involved in *Parker*, where the state retained complete control over the restrictions to be adopted, posed no threat of the abuse of private power, and the Court accordingly

<sup>14</sup> The Commission was composed of the State Director of Agriculture, and eight other members appointed by the Governor and confirmed by the State Senate. 317 U.S. at 346.

held that the California regulations did not offend the Sherman Act.<sup>15</sup>

A contrary conclusion was reached in *Schwegmann Bros. v. Calvert Distillers Corp.*, *supra*. This Court there faced a challenge to the enforcement of a Louisiana statute which allowed distillers to negotiate a minimum resale price with one retailer, and then made that price binding on all retailers selling that distiller's brand of liquor. The statute was thus very similar to that involved in this case,<sup>16</sup> with the exception that distillers were not required to establish minimum resale prices for their brands if they chose not to.

Even though the Louisiana statute was unquestionably an enactment of the State acting as sovereign, and reflected a clear policy decision rejecting unrestrained competition, the Court held that the statute was invalidated by the Sherman Act.<sup>17</sup> Un-

<sup>15</sup> In addition to holding that the Sherman Act does not apply to programs in which the state actively regulates a sector of the economy (317 U.S. at 350-352), the Court relied on the congruence of the state program there at issue with the policies of the Agricultural Marketing Agreement Act of 1937, ch. 296, 50 Stat. 246, 7 U.S.C. 601 *et seq.*, in holding that it did not conflict with that statute (317 U.S. at 352-359).

<sup>16</sup> Indeed, California provides for a similar private remedy to enforce compliance. Cal. Bus. & Prof. Code § 24752 (West 1964).

<sup>17</sup> The Court also ruled that the statute was not saved by the Miller-Tydings Act, ch. 690, Tit. VIII, 50 Stat. 693 (1937), which at that time permitted certain "fair trade" laws. That inquiry was necessary only because the Court decided that the statute would otherwise have to be struck down under the Sherman Act.



like the statute in *Parker*, the Louisiana statute permitted private anticompetitive conduct over which the State retained no check or control. Stating its holding succinctly, the Court observed that "when a state compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids. See *Parker v. Brown*, 317 U.S. 341, 350." *Schwegmann Bros. v. Calvert Distillers Corp.*, *supra*, 341 U.S. at 389.

The difference between the present mandatory resale price maintenance program and the so-called optional program struck down in *Schwegmann* is therefore merely a difference of degree. There, as here, "non-signers" were compelled by the State to observe the resale price maintenance restraint whether they wished to do so or not. The program there was optional only for the producer. And there, as here, the state statute conferred on the producer unregulated discretion over the substance of the restraint being imposed by state compulsion—thus giving to producers precisely the power squarely denied them by federal law (now specifically reasserted in this context by the Consumer Goods Pricing Act of 1975).

This case is thus unlike *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), and *New Motor Vehicle Board of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96 (1978), which concerned statutes that restricted private economic activity in a potentially anticompetitive manner but, at the same time, provided for continued state supervision and control over the restraint. In

*Bates*, which concerned a state bar disciplinary rule prohibiting advertising by attorneys, the Court noted (433 U.S. at 361-362) that the advertising ban was subject to "pointed re-examination" by the Arizona Supreme Court in any enforcement proceeding and that the state bar was itself under the court's "continuous supervision." Similarly, in *New Motor Vehicle Board*, which involved a statute restricting the location of new automobile dealerships in proximity to established dealers, the law did not allow private parties to decide which new dealerships would be permitted; instead it placed that decision in the hands of the New Motor Vehicle Board, a California state agency directed by law to give notice to affected parties and hold a hearing before making its decision. And that agency also could maintain "ongoing regulatory supervision" over the duration of any temporary restraint on the establishment of a new dealership. 439 U.S. at 110.<sup>18</sup>

The California Supreme Court, in the opinion relied on below, correctly discerned from all these cases a requirement that the state statute not leave private parties with the "ultimate power of decision" over the restraint, or leave the state with "no control over the substance of their actions." *Rice v. Alcoholic*

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<sup>18</sup> Moreover, the Sherman Act itself does not prohibit all vertical agreements restricting the location of distributorships, but permits such agreements where competition is not unreasonably restrained. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). See also *Exxon Corp. v. Governor of Maryland*, *supra*.

*Beverage Control Appeals Board*, *supra* (Pet. App. C-16). Similarly, the Third Circuit, when faced with a statute compelling liquor dealers to fix minimum prices under a system virtually identical to the California statute involved here, held it to be invalid under the Sherman Act because it gave the government "no power to approve, disapprove, or modify the prices fixed by private persons." *Norman's on the Waterfront, Inc. v. Wheatley*, 444 F.2d 1011, 1018 (3d Cir. 1971). See also 1 P. Areeda and D. Turner, *Antitrust Law* ¶ 213 (2d ed. 1978), and cases cited therein.

The lack of state supervision or control over the substance of the restraint, to assure protection of the public interest, is in our view decisive of the preemption question here. As Mr. Justice Blackmun explained in his opinion concurring in the judgment in *Cantor v. Detroit Edison Co.*, *supra*, 428 U.S. at 611:

A particularly strong justification exists for a state-sanctioned scheme if the State in effect has substituted itself for the forces of competition, and regulates private activity to the same ends sought to be achieved by the Sherman Act. Thus, an anticompetitive scheme which the State institutes on the plausible ground that it will improve the performance of the market in fostering efficient resource allocation and low prices can scarcely be assailed.

The requirement of state supervision or control derives at bottom from the need to reconcile the aims of the Sherman Act, on the one hand, with the interests of the states in a federal system, on the other.

The Sherman Act was passed in an era of concern over "the vast accumulation of wealth in the hands of corporations and individuals," and the fact that "combinations known as trusts were being multiplied, and the widespread impression that their power had been and would be exerted to oppress individuals and injure the public generally." *Standard Oil Co. v. United States*, 221 U.S. 1, 50 (1911). Aggregations of economic power subject to the control of the state, or other restrictions which replace competition with state control, do not pose the same potential for abuse.

Where the state merely requires private parties to engage in anticompetitive conduct, but leaves their conduct entirely subject to their own control, these considerations are reversed. All the concerns embodied in the Sherman Act, relating to the dangers of unrestrained anticompetitive conduct, are present to the same extent as if the state were not involved at all. Indeed, given the incentive for private companies to engage in such behavior, the state's "requirement" that they do so will often be superfluous. At the same time, if the state retains no control over the conduct of the parties or the substance of the restraint, then the state's interest can no longer be described as an interest in subjecting a portion of its economy to *its own* control. Instead, the only interest at stake is an interest in turning a sector of the economy over to the control of private parties without having them restrained either by the Sherman Act or by the state. This is an interest which the Supremacy Clause does not permit. See *Northern*



*Securities Co. v. United States*, 193 U.S. 197, 346 (1904).

Here California has simply sent wine producers out with a mandate to set the prices at which their products may be sold by any wholesaler in either of two of the three trading areas in the State. The State's role is not to regulate or even approve the prices established but rather to enforce them without question through the sanctions of fines and suspension of licenses of those wholesalers who fail to comply. The State is thus not engaged in regulation, which typically has some coincidental anticompetitive effect. It has, rather, simply countermanded the federal policies expressed in the Sherman Act. There is no active state supervision which could reduce the "concern that federal policy is being unnecessarily and inappropriately subordinated to state policy." *Bates v. State Bar of Arizona*, *supra*, 433 U.S. at 362. However much deference is due the states in their regulation of commerce within their borders, it cannot authorize so plain a conflict with federal policy as this.<sup>19</sup> The California statute is merely a pro tanto

<sup>19</sup> Such deference may be appropriate where a state law with potential anticompetitive effects does not—as here—absolutely traverse clear federal policy but, instead, shares the "basic purposes" of an existing federal law. See *Exxon v. Governor of Maryland*, *supra*, 437 U.S. at 130-131 (state law objectives similar to those of the Robinson-Patman Act); *Parker v. Brown*, *supra*, 317 U.S. at 354-357 (state law consistent with the policies of the Agricultural Marketing Agreement Act of 1937).

Here federal legislation applying specifically to the liquor industry—the Federal Alcohol Administration Act, 27 U.S.C. 201 *et seq.*—incorporates important federal antitrust policies

repeal of the Sherman Act, and therefore is invalid under the Supremacy Clause unless general preemption principles are superseded by the Twenty-First Amendment.

## II. THE SECOND SECTION OF THE TWENTY-FIRST AMENDMENT DID NOT ABROGATE CONGRESS' OWN POWER TO REGULATE INTERSTATE COMMERCE IN LIQUOR AND DID NOT REVOKE THE SUPREMACY CLAUSE WITH RESPECT TO REGULATION OF THE LIQUOR INDUSTRY <sup>20</sup>

Section 2 of the Twenty-First Amendment declares that importing liquor into a state in violation

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and is thereby contrary to the policies of the California law. In the Federal Alcohol Administration Act, Congress, *inter alia*, prohibited potentially anticompetitive practices such as tying arrangements characteristic of the liquor trade (27 U.S.C. 205(b)), commercial bribery (27 U.S.C. 205(c)), consignment sales (27 U.S.C. 205(d)), and interlocking directorates (27 U.S.C. 208). In its provision on interlocking directorates, Congress adapted to the liquor industry the policies of Section 8 of the Clayton Act, 15 U.S.C. 19. Congress modeled the statute as a whole on the liquor industry's Codes of Fair Competition, developed under the National Industrial Recovery Act, but specifically declined to include price disclosure and other provisions designed to reduce the vigor of competition. H.R. Rep. No. 1542, 74th Cong., 1st Sess. 4 (1935). As with other regulated sections of the economy, the Sherman Act applies to the liquor industry, *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293 (1945), and the Federal Alcohol Administration Act is silent with respect to prices and price competition.

<sup>20</sup> The Federal Trade Commission has not considered the Twenty-First Amendment question in this case, and its attorneys therefore did not participate in the preparation of this portion of the brief.



of the state's laws is "hereby prohibited."<sup>21</sup> The Amendment is not a self-executing criminal provision, however, nor has Congress generally made it a federal crime to import liquor into a state in violation of state law.<sup>22</sup> The meaning of this obscure language is discernible only through a review of its origin in the interplay of state regulation of liquor and judicially-developed restrictions on state regulation of interstate commerce.<sup>23</sup>

#### A. State Regulation Of Liquor, 1847-1933

The states regulated liquor free from constitutional restraint until 1890, when the Supreme Court held that the Commerce Clause, even in the absence of congressional action, denied states the power to prohibit trade in liquor to the extent the liquor had passed through interstate commerce. *Leisy v. Hardin*, 135 U.S. 100, 109-110 (1890), overruling *The License*

<sup>21</sup> The provision "constitutionalized" the Webb-Kenyon Act, 27 U.S.C. 122, discussed in detail below; the statute and the constitutional provision are thus coterminous, and petitioner's reliance on the Act (Pet. Br. 12-13, 34-37) adds nothing to its argument. See also note 26, *infra*.

<sup>22</sup> It has done so only with respect to "dry" states, those which prohibit the use of liquor with more than 3.2 percent alcohol, other than for sacramental, medicinal or other excepted uses, and which adopt licensing requirements for legal liquor. Liquor Enforcement Act of 1936, ch. 815, Section 3, 49 Stat. 1928 (1936) (current version at 18 U.S.C. 1262).

<sup>23</sup> "Section 2 of the twenty-first amendment is not easy to understand, unless it is viewed in the light of its legislative history and general background." S. Rep. No. 1784, 75th Cong., 3d Sess. 3 (1938).

*Cases*, 46 U.S. (5 How.) 504, 577-580 (1847). But the Court said that Congress might assent to state regulation and thus authorize it (135 U.S. at 108, 119, 124). Congress promptly gave its assent. In the Wilson Act, ch. 728, 26 Stat. 313 (1890), 27 U.S.C. 121, it authorized the states to regulate liquor "upon [its] arrival" in the state "to the same extent and in the same manner as though such \* \* \* liquors had been produced" there. The Court upheld the Wilson Act (*In re Rahrer*, 140 U.S. 545 (1891)), but subsequently held that arrival did not occur until the liquor was delivered to the consignee, thus shielding from state prohibition laws any interstate deliveries made directly to consumers. *Rhodes v. Iowa*, 170 U.S. 412 (1898).

While cast as an interpretation of the statute (170 U.S. at 419-421, 423-424) and expressly pre-terminating whether Congress could authorize state regulation of interstate shipments prior to delivery (170 U.S. at 426), the *Rhodes* decision nevertheless emphasized the constitutional mandate for protection of interstate commerce and the threat to that mandate posed by the extraterritorial effect of state laws prohibiting shipments into their territory. 170 U.S. at 420, 422, 424. See also *Vance v. W.A. Vandercook, Co. (No. 1)*, 170 U.S. 438 (1898); Kerr, *The Webb Act*, 22 Yale L.J. 567, 574 (1913). (*Rhodes* held "that a State liquor law which attempted to attach to a shipment at the border of a State is repugnant to the Constitution as controlling contracts made in another State").

Forewarned, Congress, in the Webb-Kenyon Act, ch. 90, 37 Stat. 699, 27 U.S.C. 122, again came to the aid of the dry states by itself regulating interstate commerce in liquor, prohibiting it where it violated state law. While the Act declared that interstate shipment of liquor into a state was "prohibited" where the liquor "is intended [to be] used, either in the original package or otherwise, in violation of any law of such State," it imposed no penalties. Congress intended only "to withdraw the protecting hand of interstate commerce from intoxicating liquors transported into a State." H.R. Rep. No. 1461, 62d Cong., 3d Sess. 1 (1913). Under the Wilson Act as interpreted in *Rhodes v. Iowa*, *supra*, the states were powerless to act until the liquor reached the consignee.<sup>24</sup> By prohibiting such shipments as a matter of federal law, the bill "would permit the State officers \* \* \* to seize such liquors [if] it was intended to be used in violation of the laws of the State \* \* \*." H.R. Rep. No. 1461, *supra*, at 2. The bill thus did no more than "give the various States the power to control the liquor traffic as to them may seem best. It would remove the shackles of interstate-commerce law from the action of the States and discontinue the

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<sup>24</sup> Even commercial amounts of liquor—a shipment of 500 halfpints, 250 pints, and 140 quarts of liquor was cited—were, under "[t]he sacred law of interstate commerce[,] protected \* \* \* from molestation by State officers, not only while in transit, not only while they remained in the express office or depot, but also until they were actually delivered to those who intended to violate the State laws." H.R. Rep. No. 1461, *supra*, at 2.

handicap under which they now labor \* \* \* and leave them freer to break up the 'blind tigers' and 'bootleggers' that infest many 'dry' States." *Ibid.* See also S. Rep. No. 1060, 62d Cong., 3d Sess. 24-25 (1913).<sup>25</sup>

The Court upheld the Webb-Kenyon Act as a regulation of interstate commerce, acknowledging Congress' limited purpose to relieve the state of the restriction otherwise imposed by the Commerce Clause. *Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U.S. 311, 323-324 (1917); *McCormick & Co. v. Brown*, 286 U.S. 131, 140-141 (1932).

The ratification of the Eighteenth Amendment and the enactment of the National Prohibition Act ("the Volstead Act"), ch. 85, 41 Stat. 305, repealed, ch. 740, 49 Stat. 872, mooted the questions of state power under the Commerce Clause and the constitutionality of the Webb-Kenyon Act. At the same time, the Eighteenth Amendment not only imposed Prohibition, but represented an independent grant of authority to Congress beyond the scope of federal power under the Commerce Clause. *National Prohibition Cases*, 253 U.S. 350, 387 (1920). For the states, however, the authorization contained in Section 2 of that amendment merely

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<sup>25</sup> The law was passed over vigorous constitutional objections and President Taft's veto on constitutional grounds (49 Cong. Rec. 4291-4292 (1913)) on the recommendation of Attorney General Wickersham. *Constitutionality of Proposed Legislation Divesting Intoxicating Liquors of their Interstate Character in Certain Cases*, 30 Op. Att'y Gen. 88, 99-100, 107, 111 (1913).

removed the Commerce Clause limitation on inherent state police powers. *United States v. Lanza*, 260 U.S. 377, 381 (1922).

#### B. Consideration And Approval Of The Twenty-First Amendment

Congress' subsequent desire to repeal Prohibition required Congress to decide what form of regulation to substitute in its place. Its own experience in attempting to regulate liquor throughout the nation, without regard to whether interstate commerce was involved, had had a chastening effect. Congress accordingly resolved to remove itself from the enforcement of regulations properly the subject of local ordinances. At the same time, its desire to return to pre-Prohibition state regulation prompted it to forestall further challenges to the constitutionality of that state regulation.

The Twenty-First Amendment, as reported out by the Senate Judiciary Committee, contained as Section 2 the provision now in effect as Section 2 of the Amendment—an adoption in simplified form of the Webb-Kenyon Act. It also contained—as Section 3—a provision that would have authorized both the states and Congress “to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold.” S. Rep. No. 1022, 72d Cong., 2d Sess. (1933); see also 76 Cong. Rec. 4138-4139 (1933).

The floor manager of the bill, Senator Blaine, stated that the purpose of Section 2 was to secure for the dry states the power over interstate liquor

already contained in the Webb-Kenyon Act. That Act, he explained, was construed by the Court in *Clark Distilling Co. v. Western Maryland Ry Co.*, *supra*, as having been “designed to give the State \* \* \* power of regulation over intoxicating liquor from the time it actually entered the confines of the State.” 76 Cong. Rec. 4140 (1933). But because the Court was divided in that case “and that division of opinion seems to have come down to a very late day,” the Judiciary Committee “proposed to write permanently into the Constitution” the “pending proposal,” which would “restore[ ] to the States, in effect, the right to regulate commerce respecting a single commodity—namely, intoxicating liquor.” *Id.* at 4141. Senator Blaine expressed the committee’s view that since Webb-Kenyon had been “sustained by a divided court, \* \* \* we could well afford to guarantee to the so-called dry States the protection designed by section 2.” *Ibid.*<sup>26</sup>

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<sup>26</sup> Senator Walsh of Montana reiterated this view later in the debate (76 Cong. Rec. 4219 (1933)):

The purpose of the provision in the resolution reported by the committee was to make the intoxicating liquor subject to the laws of the State once it passed the State line and before it gets into the hands of the consignee as well as thereafter.

Senator Borah, the other leading proponent of Section 2, argued that the uncertainty of the constitutionality of the Webb-Kenyon Act, and the fact that the dry states would have to rely on the continuing acquiescence of Congress, justified putting the provision in the Constitution. *Id.* at 4170. Even approval on constitutional grounds by the present Court would not guarantee like approval in the future, Senator



The balance of the debate was largely devoted to the wisdom of prohibiting saloons and authorizing Congress, along with the states, to enforce that prohibition as provided in the proposed Section 3. No one stood to defend saloons, which were universally regarded as a great evil.<sup>27</sup> The question was not whether there should be saloons, but whether something properly the subject of a local ordinance should be in the Constitution.<sup>28</sup> The dominant theme was that the federal effort to regulate local mores and morals, compelled by the Eighteenth Amendment, was an absolute failure, and that it should not be continued even by narrowly restricting the scope of the prohibition to saloons.<sup>29</sup> The states had long

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Borah argued, noting the overruling of the *License Cases* more than 40 years later in *Leisy v. Hardin*, *supra*, and *Bowman v. Chicago & Northwestern Ry. Co.*, 125 U.S. 465 (1888). 76 Cong. Rec. 4171 (1933).

<sup>27</sup> See, e.g., *id.* at 4219-4220 (Sen. Glass), 4226 (Sen. Robinson), 4228 (Sen. Borah).

<sup>28</sup> See, e.g., *id.* at 4144 (Sen. Wagner), 4176-4177 (Sen. Walsh of Massachusetts). Senator Wagner argued that Section 3 brought in through the back door the very prohibition meant to be thrown out through the front door of Section 1. *Id.* at 4147-4148.

<sup>29</sup> 76 Cong. Rec. 4130 (1933) (Sen. Fletcher), 4143 (Sen. Blaine), 4144-4145, 4146, 4147-4148 (Sen. Wagner), 4172, 4173-4174 (Sen. Borah), 4177 (Sen. Walsh of Massachusetts), 4220 (Sens. Glass and Reed), and 4227 (Sen. Bingham).

While a grant of concurrent power would clearly have implied supreme federal power under the Supremacy Clause (*id.* at 4143, 4156, 4774-4776), including the power to compel states to accept interstate liquor shipments against their will (*id.* at 4173, 4174), the scope of federal power in the absence

regulated liquor, and Congress had acquiesced in that regulation. In the view of the Congress that enacted the Twenty-First Amendment, it was only the Supreme Court's expansive reading of substantive economic doctrines into the Commerce Clause that prompted the Court to find there an inherent restriction on state power under that clause *simpliciter*. See 76 Cong. Rec. 4172 (1933). That view, not yet

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of Section 3 was hotly contested. Some thought Congress would have no power to regulate liquor at all (*id.* at 4141, 4142), while others thought Congress would retain its general power over interstate commerce (*id.* at 4219), and perhaps gain an implied power to enforce Section 2—that is to protect dry states against unwanted liquor from neighboring wet states (*id.* at 4172, 4225, 4226).

The remarks of Senators Blaine and Wagner relied on by Amicus Virginia Beer Wholesalers Association (VBWA Br. 9-11) as proof that Congress rejected Section 3 because it wanted the states to retain “exclusive control over liquor traffic given [them] by section 2,” must be read in the light of this considerable diversity of views and can hardly be considered an expression of the intent of Congress. Moreover, it is not clear that Senator Blaine's remarks, considered in their entirety, unequivocally support petitioner's position. While Senator Blaine did, in the course of expressing “his own personal viewpoint” (as distinct from that of the Judiciary Committee), state that the purpose of Section 2 was “to restore to the States by constitutional amendment absolute control in effect over interstate commerce affecting intoxicating liquors which enter the confines of the States” (*id.* at 4143), he also stated (*ibid.*) that Section 3 was designed “to take away from the States the powers that the States would have in the absence of the eighteenth amendment.” Nothing in his remarks elsewhere suggests that Senator Blaine believed that before the enactment of the Eighteenth Amendment state laws were not subject to the operation of the Supremacy Clause when they conflicted with federal laws enacted pursuant to a constitutional power of Congress.

then repudiated by the Court, denied states the power, exercised continuously since colonial days, to regulate liquor under their general police powers. With the repeal of Prohibition, Senator Borah believed that "to adopt and enjoy their own policies, [dry States need] some other provisions of the Constitution[] than those which existed prior to the adoption of the eighteenth amendment." *Id.* at 4172. The problem presented by decisions of this Court inferring a lack of state power from congressional inaction under the Commerce Clause "was sought to be remedied by the Webb-Kenyon Act," Senator Borah said; and he thought it just and fair to "incorporat[e] it permanently in the Constitution of the United States." *Ibid.*

The function of both Webb-Kenyon and Section 2, then, was not to diminish Congress' power over interstate commerce, but to augment the power of the states by eliminating the Commerce Clause restriction, thus restoring to them the power to regulate liquor they had once exercised. While Congress generally sought to remove the federal government from direct regulation of the local sale and consumption of liquor, its debate was against the backdrop of both the Eighteenth Amendment, which extended the power of Congress beyond the limits of interstate commerce to pervasive, nationwide enforcement of prohibition wherever liquor might be made, sold or used, and the proposed Section 3, which would have retained for Congress this power reaching beyond the accepted scope of the Commerce Clause. There was no discus-

sion in the debates of limiting congressional power to enact laws under the Commerce Clause or any other constitutional grant of power in existence before passage of the Eighteenth Amendment.

In the absence of any such discussion, the only basis for finding an intent on the part of Congress to subordinate its established legislative powers to those of the States is to infer it from the evident purpose of Congress to relieve the States of the Commerce Clause restriction on their powers. Such an inference appears to underlie Mr. Justice Frankfurter's assertion—relied on by petitioner (Pet. Br. 25) and an amicus (VBWA Br. 15-16)—that "the Sherman Law, deriving its authority from the Commerce Clause," must "yield to state power drawn from the Twenty-first Amendment." *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293, 300-301 (1945) (Frankfurter, J., concurring opinion). This question has, of course, not been decided by this Court (*Heublein, Inc. v. South Carolina Tax Comm'n*, 409 U.S. 275, 282 n.9 (1972)).

In our view, no such inference is justified. The Twenty-First Amendment does not in terms restrict in any way the pre-Eighteenth Amendment legislative powers of Congress, except the power to require "transportation or importation into any State \* \* \* of intoxicating liquors, in violation of the laws thereof \* \* \*." It is true that the restrictions of the Commerce Clause itself on state legislative authority (which the Amendment's sponsors sought to eliminate) derive only by negative implication from the



powers that Clause confers on Congress—thereby implying a certain symmetry between the constitutional grant and its negative implications. But this does not mean that the Constitution itself could not be amended to reduce the latter without a concomitant restriction of the former. That, we submit, is what happened here. Since the apparent intention of those who adopted the Twenty-First Amendment was only to eliminate the Clause's negative implications for state liquor regulation, Congress should not be deemed to have restricted its own constitutionally conferred legislative powers wholly by unstated implication.

#### C. Subsequent Action By Congress

In 1935, not long after its approval of the Twenty-First Amendment, Congress exercised the power it believed it still enjoyed to regulate the interstate liquor industry: it enacted the Federal Alcohol Administration Act, 27 U.S.C. 201 *et seq.*<sup>30</sup> Congress

<sup>30</sup> Congress did not enact this federal legislation at the time it sent the proposed amendment to the states because it expected ratification to take at least two years. See 76 Cong. Rec. 4002 (1933) (Sen. Borah); *id.* at 4149 (Sen. Walsh of Montana). Cf. *id.* at 4005, 4140 (Sen. Blaine); see also H.R. Rep. No. 1542, 74th Cong., 1st Sess. 3 (1935) ("House Report"). By December of that year, when the Amendment was ratified, Congress had enacted the National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933), repealed, Pub. L. No. 89-554, 80 Stat. 648 (1966), authorizing industries to develop national codes of fair competition; the beer industry did so voluntarily, while President Roosevelt imposed codes on the wine and distilled liquor trades. With the demise of the codes in *Schechter Poultry Corp. v. United States* ("Schechter Poultry"), 295 U.S. 495 (1935), Congress was compelled to act

specifically considered the possibility of state-federal conflict and elected to override contrary state law. Congress found that the distilled spirits, wine, and beer industries were national in scope, not amenable as a practical or constitutional matter to effective state regulation, and that they presented serious problems owing to the involvement of organized crime. "Federal regulation, in the field in which the Constitution permits the exercise of Federal authority, is necessary to deal with these problems." House Report at 1-2. The principal regulatory tool was a license requirement imposed on all members of the liquor industry, and it was imposed even on those doing a strictly interstate business because of the need to prevent evasions of both federal law and state laws enacted under Section 2 of the Twenty-First Amendment. See House Report at 7; *Hanf v. United States*, 235 F.2d 710 (8th Cir. 1956), cert. denied, 352 U.S. 880 (1956). The Court summarily rejected a challenge to Congress' continuing power to regulate the liquor industry under its Commerce Clause powers in *Jameson & Co. v. Morgenthau*, 307 U.S. 171, 172-173 (1939), affirming the constitutionality of the Federal Alcohol Administration Act.

In that same act, Congress explicitly considered and provided for the supremacy of its laws over conflicting state law. Congress imposed detailed labeling

promptly to fill the void in federal regulation. See House Report at 2-4; S. Rep. No. 1215, 74th Cong., 1st Sess. 2-3 (1935) ("Senate Report").



requirements and prohibited the alteration of labels on liquor "held for sale in interstate \* \* \* commerce or after shipment therein \* \* \*" 27 U.S.C. 205(e), para. 2. Although the administrator was authorized to make exceptions where states imposed additional labeling requirements (*ibid.*), the House Report, at 14, specified that this was allowed only if the state requirement was "not in conflict with the Federal requirements."<sup>31</sup> Congress similarly exercised its supreme power over interstate commerce in broadly prohibiting consignment and bulk sales. 27 U.S.C. 205(d), 206(a).<sup>32</sup> Congress also expressly considered whether it had the constitutional power to regulate state agencies and officials with respect to labeling and consignment sales where the state had established

<sup>31</sup> The Senate Report concurred in most of the House Report and did not address provisions, including labeling and consignment sales, with which it agreed. Senate Report at 3.

<sup>32</sup> The House recommended authorization of bulk sales but was careful to provide that its authorization was not to be construed as overriding contrary state prohibitions (House Report at 10), which would occur under the Supremacy Clause. See also *id.* at 6 (federal permit "does not authorize \* \* \* operations which are prohibited by State laws"). The Senate opposed authorizing bulk sales because such sales would facilitate violations of both dry state laws and federal tax and labeling laws, and its view prevailed. 27 U.S.C. 206(a).

Congress permitted the states to require separate corporate entities whose directorships might technically violate its own prohibition against interlocking directorates; it did so because the state policies would not create anticompetitive interlocks, in conflict with Congress' purpose, not because Congress lacked the power to override state law. House Report at 15-16; 27 U.S.C. 208(b).

itself as the monopoly distributor of alcoholic beverages, and concluded that it had. House Report at 11, 14.<sup>33</sup>

Congress enacted these explicit restrictions on State power only two days after it formally re-enacted the Webb-Kenyon Act, ch. 740, Section 202, 49 Stat. 877, to eliminate doubts about its continuing validity in light of the enactment and then the repeal of the Cullen Beer Act, which similarly divested "3.2" beer of its "interstate character." S. Rep. No. 1330, 74th Cong., 1st Sess. 5 (1935); H.R. Rep. No. 1601, 74th Cong., 1st Sess. 5-6 (1935). Congress could not have intended in Webb-Kenyon (and thus in the Twenty-First Amendment) to subordinate its legislative power to that of the states,

<sup>33</sup> Questions of constitutional power were far from academic in 1935 in the wake of *Schechter Poultry, supra*, and other decisions holding early New Deal laws unconstitutional. Thus, in introducing the liquor regulation bill, its sponsor, Representative Cullen, took care to assure the House (79 Cong. Rec. 11714 (1935); emphasis added):

*No provision of the bill is violative of the Constitution either because it denies a fundamental right secured by the Constitution or because it invades a field of regulation reserved by the Constitution to the States. [Nor will the bill] suffer from the infirmity of invalid delegation of legislative power.*

See also *ibid.* (the committee was "careful to confine the bill to the Federal field") and *id.* at 11712 (Rep. Sabath).

In the following year, Congress again regulated the liquor industry by enacting legislation to assist dry states in enforcing their prohibition laws. Liquor Enforcement Act of 1936, ch. 815, Sections 1-12, 49 Stat. 1928. Congress has not since exercised its power to regulate interstate commerce in liquor.

given its exercise of that power, expressly overriding conflicting state law, just two days later.

The views of the Seventy-Fourth Congress are entitled to substantial weight in determining the meaning of the Twenty-First Amendment. It was close in time to the Congress which proposed the Amendment,<sup>34</sup> and in its positive enactments it was declaring as strongly as it could its understanding that the Twenty-First Amendment did not reverse state-federal relations under the Supremacy Clause in the regulation of the liquor trade. Subsequent legislation is frequently relied upon to ascertain the intent of an earlier Congress, or of the Constitutional Convention in promulgating the Constitution. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-381 (1969); *Humphrey's Executor v. United States*, 295 U.S. 602, 630-631 (1935); *Martin v. Hunter's Lessee*, 14 U.S.

<sup>34</sup> For this reason, these views of the 74th Congress carry far more weight than the statement (see Pet. Br. 22) made 40 years later in the Senate Report on the bill repealing the Miller-Tydings and McGuire Acts to the effect that despite repeal of those statutes alcohol manufacturers would be free to continue enforcing resale prices "in States which pass price fixing statutes pursuant to the Twenty-First Amendment." S. Rep. No. 94-466, 94th Cong., 1st Sess. 2 (1975). That statement, in any event, does not refer specifically to state enforcement of producer-set resale prices. As the House Report on the same bill stated, "The repeal [of the Miller-Tydings and McGuire Acts] would terminate the power of liquor manufacturers to set resale prices under a general 'fair trade' statute, but would leave unimpaired whatever power the States have under the Twenty-First Amendment to regulate the importation of liquor from outside the State. H.R. Rep. No. 94-341, 94th Cong., 1st Sess. 3 n.2 (1975).

(1 Wheat.) 304, 351-352 (1816). Congress' action in establishing the Federal Alcohol Administration Act confirms what was said in the debates on the Twenty-First Amendment: the states' power to regulate liquor, whether moving in intrastate or interstate commerce, was to be relieved of the limitations imposed by the Commerce Clause *simpliciter*. But Congress did not intend to subordinate its power under the Commerce Clause to that of the states.

#### D. Judicial Interpretation

This Court has repeatedly held that the Twenty-First Amendment operated to relieve the states of the restriction imposed by the Commerce Clause on their police power over the regulation of liquor moving in interstate commerce.<sup>35</sup> But it has emphasized that the Amendment did not repeal the Commerce Clause *pro tanto* with respect to liquor: it continues to operate as a restraint on state power where the state's regulation is not related to the purpose of the Amendment,

<sup>35</sup> *Craig v. Boren*, 429 U.S. 190, 206 (1976); *Heublein, Inc. v. South Carolina Tax Comm'n*, *supra*, 409 U.S. at 283; *Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 42 (1966); *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341, 344, 346 (1964); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 330 (1964); *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939). The price posting at issue in *Seagram* involved only licensees' posting of their own selling prices, not resale prices binding on wholesalers or retailers who purchased the liquor from them (384 U.S. at 38-39 & 53-54); and this Court found no "clear conflict" between the Sherman Act and the state law at issue (*id.* at 45). Cf. Petitioner's Brief at 26-27.

*Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964), and it continues to operate as a grant of authority to Congress to regulate interstate commerce in liquor. *Jameson & Co. v. Morgenthau*, *supra*; *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293, 299 (1945).

Like other provisions of the Constitution, the Twenty-First Amendment does not stand alone, but must "be considered in the light of the other[s], and in the context of the issues and interests at stake in any concrete case." *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, *supra*, 377 U.S. at 332. Thus, this Court has held that the relief given by the Amendment from the restrictions imposed by the Commerce Clause did not also relieve the states of the restrictions imposed by such other constitutional provisions as the Export-Import Clause (*Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964)) and the Fourteenth Amendment (*Craig v. Boren*, *supra*, 429 U.S. at 206; *Wisconsin v. Constantineau*, 400 U.S. 433 (1971)). While the Court has referred to the Amendment "as conferring something more than the normal state authority over public health, welfare, and morals" (*California v. LaRue*, 409 U.S. 109, 114 (1972)),<sup>36</sup> it subsequently noted that it had not yet addressed directly "how that

<sup>36</sup> Even there, however, the Court noted only that Congress sought, as we have argued above, to relieve the states of the restriction imposed on their powers by the Commerce Clause *simpliciter*. *Ibid.*; *Hostetter v. Idlewild Bon Voyage Liquor*, *supra*, 377 U.S. at 330.

Amendment affects Congress' power under the Commerce Clause." *Heublein, Inc. v. South Carolina Tax Commission*, *supra*, 409 U.S. at 282 n.9.

**E. Recognition Of the Supremacy Of Federal Policy  
In This Case Would Not Impinge On The Basic  
State Interests Protected By The Twenty-First  
Amendment**

As we have shown (pages 40-45, *supra*), Congress enacted the Federal Alcohol Administration Act shortly after passage of the Twenty-First Amendment on the evident assumption that the Supremacy Clause continued to make federal laws affecting interstate trade in liquor prevail over conflicting state laws, at least where the core state interests addressed by Section 2 of the Amendment (see pages 34-40, *supra*) are not concerned. Congress has shown no inclination to infringe on those interests by imposing a liquor trade on states that do not want it, and certainly an acceptance of federal supremacy in the present case will have no such result.

Invalidating those portions of California wine-pricing laws that directly conflict with the central policy of the Sherman Act will by no means deprive the State of the power to carry out its avowed policy of promoting temperance (Cal. Bus. & Prof. Code § 24749 (West 1964)). Thus, California may prohibit the sale of alcohol within its borders, restrict the number of licensed sellers, regulate their location, and discourage use and abuse of alcohol through



educational programs.<sup>37</sup> And if it prefers to maintain a policy of high prices, it may do so by such means as imposing heavy sales and excise taxes.<sup>38</sup> In short, a decision that the Sherman Act preempts the state provisions at issue here by virtue of the normal operation of the Supremacy Clause will in no way return the federal government to that role of dictator of local mores respecting alcohol use that

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<sup>37</sup> In contrast to such measures, the State's uniform price-maintenance scheme is unlikely to promote temperance in any significant respect. The literature on the effect of resale price maintenance for liquor, canvassed by the California courts (see Pet. App. C-37 to C-38), shows that the demand for liquor is largely price inelastic, so that the lower prices which would follow the end of the resale price maintenance would not result in increased consumption. See Moreland Commission, Study Paper No. 5, "Resale Price Maintenance in the Liquor Industry," at 40-60, and Report and Recommendations No. 3, "Mandatory Resale Price Maintenance," at 17-23 (cited in *Seagram & Sons, Inc. v. Hostetter*, *supra*, 384 U.S. at 39 n.8). See also California Department of Finance, *Alcohol and the State: A Reappraisal of California's Alcohol Control Policies* 14-20 (1974). The fears of aggressive "price wars" and increased consumption are based on a single short period in New York late in the Depression which, on close examination, proved to involve many factors other than increased individual liquor consumption.

<sup>38</sup> To the extent that California's current price maintenance policy is aimed simply at protecting small retailers and wholesalers from price competition (see Pet. App. C-34 to C-36), it has no relation to the concerns of the Twenty-First Amendment and flies in the face of the Sherman Act. We note that it is this interest—and not temperance—that petitioner, an association of liquor dealers, described as the basis for its intervention below (A. 25-27).

the enactors of the Twenty-First amendment were at pains to disavow.

A contrary holding could have serious effects on a broad range of federal regulation. Other federal laws that—like the Sherman Act—are of general application might then be subject to piecemeal dismemberment as they apply to the liquor industry, despite indications of express congressional intent to override conflicting state laws or to wholly occupy the field. To cite only a few of the many possible examples, a state might prohibit contents disclosure on liquor labels, contrary to Congress' express declaration in 27 U.S.C. 205(e); or it might declare that union organization of liquor industry employees facilitated the involvement of organized crime, and accordingly prohibit liquor industry employees from exercising their rights under the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, to organize, engage in collective bargaining, or strike. States might seek to prohibit disclosure of important corporate information in securities of liquor corporations where disclosure would otherwise be required under the Securities Act, 15 U.S.C. 77a *et seq.* Cf. *SEC v. National Securities, Inc.*, 393 U.S. 453 (1969). To protect itself from the illegal diversion of liquor, a state might seek to require special licenses for interstate common carriers handling liquor and so deny authority to carriers whose service was authorized by the Interstate Commerce Commission in the "public convenience and necessity." Pub. L. No. 95-

473, 92 Stat. 1409 (1978) (to be codified at 49 U.S.C. 10922(a)(2)).<sup>39</sup> Similarly, federal regulatory provisions designed to facilitate the collection of tax revenue might be declared subordinate to conflicting state regulation.<sup>40</sup>

In sum, a decision against federal supremacy in this case would not only frustrate important federal antitrust policies but would at least encourage litigation that could threaten federal policies in other areas. Where, as here, allowing federal law to prevail over conflicting state law does not threaten any state interest in freely choosing among promotion, tolerance, or prohibition of the liquor trade, there is no need to risk such unsettling consequences.

<sup>39</sup> See *Castle v. Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954) (Motor Carrier Act); cf. *Ziffrin, Inc. v. Reeves*, 308 U.S. 132 (1939). See also *Chicago v. Atchison, T. & S. F. Ry. Co.*, 357 U.S. 77 (1958); *Railroad Transfer Service, Inc. v. Chicago*, 386 U.S. 351 (1967); *Bowman v. Chicago & Northwestern Ry. Co.*, *supra*.

<sup>40</sup> In *Goldstein v. Maryland*, No. 16-79-2163 (D. Md.), a liquor distributor is seeking a declaratory judgment that Bureau of Alcohol, Tobacco and Firearms regulations are invalid because of a conflict with Maryland law, based on *Castlewood International Corp. v. Simon*, 596 F.2d 638 (5th Cir. 1979) (holding, on basis of Twenty-First Amendment, that federal statute restricting discounts to retailers by liquor wholesalers cannot prevail over less restrictive state statute). Cf. *Stillinovic v. United States*, 336 F.2d 862 (8th Cir. 1964); *United States v. Goldberg*, 225 F.2d 180 (8th Cir. 1955); S. Rep. No. 2090, 85th Cong., 2d Sess. 167-169 (1958).

## CONCLUSION

The decision of the California Court of Appeal should be affirmed.

Respectfully submitted.

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JANUARY 1980

**IN THE  
Supreme Court of the United States  
October Term, 1979**

**No. 79-97**

**CALIFORNIA RETAIL LIQUOR DEALERS  
ASSOCIATION,**

*Petitioner,*

**v.**

**MIDCAL ALUMINUM, INC.,**

*Respondent,*

**BAXTER RICE as Director of the Department  
of Alcoholic Beverage Control of the State of  
California,**

*Respondent.*

**MOTION OF CONSUMERS UNION OF  
UNITED STATES, INC., FOR LEAVE TO FILE A BRIEF  
AND BRIEF AMICUS CURIAE IN SUPPORT OF  
RESPONDENT**

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IN THE  
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**MOTION OF CONSUMERS UNION OF  
UNITED STATES, INC., FOR LEAVE TO FILE A  
BRIEF AMICUS CURIAE IN SUPPORT OF  
RESPONDENT**

---

Consumers Union of United States, Inc. ("Consumers Union") hereby moves the Court, pursuant to Rule 42 of this Court, for leave to file the accompanying brief *amicus curiae* in support of respondent Midcal Aluminum, Inc. ("Midcal"). Both Midcal and

respondent Baxter Rice have consented to the filing of this brief, but petitioner has refused to do so.<sup>1</sup>

### Interest of Amicus Curiae

Consumers Union is a nonprofit, membership organization chartered in 1936 to provide information, education and counsel about consumer goods and services and the management of family income. Consumers Union publishes *Consumer Reports*, a monthly magazine with a circulation of over 2 million, which regularly carries articles rating products that Consumers Union has tested, as well as articles on consumer services, marketplace economics and judicial actions that affect consumer welfare. Approximately 300,000 residents of California subscribe to *Consumer Reports*.

Since its earliest days, Consumers Union has opposed laws that permit or require resale price maintenance, or "fair trade." Pursuant to this long-standing policy, Consumers Union sought and was granted leave early in 1977 to participate as *amicus curiae* in *Rice v. Alcoholic Beverage Control Appeals Board*, 21 Cal.3d 431 (1978). Attorneys representing Consumers Union prepared briefs and participated in oral argument of that case in both the California Court of Appeal and the California Supreme Court.

Consumers Union seeks leave to participate in this case because of its belief that *Rice v. Alcoholic*

<sup>1</sup>The attorneys for Midcal gave their consent in a letter dated November 28, 1979. The attorney for respondent Rice gave his consent in a letter dated December 7, 1979. Both of these letters have been filed with the Clerk of this Court pursuant to Rule 42(2).

*Beverage Control Appeals Board* was correctly decided, and because — as conceded by both petitioner and *amicus curiae* the California Attorney General — this case is little more than a collateral attack on *Rice*.

The decision in *Rice* has been important to Consumers Union in four respects. First, of course, it was consistent with the long-standing opposition to "fair trade" laws noted above. Second, although the precise amount is hard to measure, the *Rice* decision has saved California consumers millions of dollars in the purchase of alcoholic beverages. Third, Consumers Union has been involved in other litigation (such as challenges to anticompetitive professional rules) in which parties sometimes contend that state law compels them to engage in anticompetitive acts, and that they are therefore entitled to invoke the "state action" exemption established by *Parker v. Brown*, 317 U.S. 341 (1943), even though there is no independent review by the State of their conduct. *Amicus* believes that any retreat from *Rice*'s holding on this question would significantly interfere with the proper application of the federal antitrust laws.

Finally, *amicus* wishes to defend the *Rice* Court's holding that state liquor legislation in conflict with the Sherman Act does not automatically prevail over that federal statute, but must be balanced against it to determine in each particular case which law should give way. Questions about the extent of California's power to enact anticompetitive liquor legislation have arisen frequently since 1978, as the California Legislature has considered a number of bills introduced in response to *Rice*. Consumers

Union has opposed those bills which attempted to reinstitute price fixing for alcoholic beverages. A ruling from this Court affirming that the States must take the federal antitrust laws into account when they legislate with respect to liquor will help to insure continuation of the much-needed competition that has developed in the California liquor market since *Rice*.

#### **Facts and Questions Presented by Amicus Curiae**

Although Consumers Union is confident that respondent Midcal will ably defend the ruling below, the accompanying brief should be accepted because it presents relevant facts and legal argument that may not otherwise be brought to the Court's attention. In particular, *amicus* has been informed that Midcal does not intend to discuss in its brief the temperance data and anti-loss leader statutes on which the *Rice* decision turned. These matters are important because they show that in seeking to accommodate conflicting state and federal interests in *Rice*, the California Supreme Court was weighing the strong federal policy of enforcing the Sherman Act against a state law that had utterly failed to achieve its principal purpose of promoting temperance, and was an unnecessarily broad means of achieving its secondary purpose of protecting small retailers. All of the relevant data on these issues are discussed herein.

For all of the reasons above, the motion of Consumers Union to file the accompanying brief *amicus curiae* should be granted.

Respectfully submitted,

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**TABLE OF CONTENTS**

	<u>Page</u>
Interest of Amicus Curiae .....	1
Questions Presented .....	2
Summary of Argument .....	2
<b>Argument</b>	
I . The "State Action" Doctrine Does Not Immunize California's Wine Fair Trade Laws Against A Sherman Act Attack, Because There Is No Independent Review By The State Of The Prices Set By Wine Producers .....	5
A. The Failure Of The State To Seek Review Of Cases Striking Down Fair Trade, And The Decision Of The Legislature To Eliminate Funding For Fair Trade Enforcement, Raise Serious Doubts About Whether Fair Trade Continues To Be Part Of California's Alcohol Control Policies .....	7
B. California's Decision To Compel Wine Producers To Set Prices For Their Products Is Not Enough, Standing Alone, To Exempt The Price Posting Laws From Antitrust Scrutiny .....	9
C. California's Failure To Provide For Independent State Review Of The Prices Set By Wine Producers Precludes Application Of The "State Action" Exemption In This Case .....	12

(ii)

Page

II. Section Two Of The 21st Amendment Does Not Confer Power Upon The States To Enact Liquor Legislation Without Regard To The Sherman Act, But Requires Instead That An Accommodation Be Reached Between The State's Interest In Enforcing Its Liquor Laws And The Federal Interest In Enforcing The Sherman Act .....	20
A. The Legislative History Of The 21st Amendment Leaves No Doubt That The Sole Purpose Of Section Two Was To Allow The "Dry" States To Remain "Dry." .....	22
B. This Court's Decisions Under The 21st Amendment Recognize That State Liquor Legislation Is Not Automatically Valid If It Conflicts With The Sherman Act, But Must In Each Case Be Considered Against The Sherman Act To Determine Which Law Should Prevail .....	28
C. <i>Rice</i> Correctly Held That In Cases Where State Liquor Legislation And The Sherman Act Conflict, The 21st Amendment Requires That Each Statute Be Evaluated In The Light Of Its Purposes And Its Efficacy In Achieving Them, And That The Most Important Interest Be Allowed To Prevail .....	32
III. <i>Rice</i> Was Correct When It Concluded That The Sherman Act Must Prevail Over California's Fair Trade Laws For Liquor, Because The Latter Statutes Have Failed To Promote Temperance And Are An Unnecessarily Drastic Means Of Protecting Small Retailers .....	37
A. The Evidence Is Clear That Liquor Fair Trade Laws Do Not Promote Temperance .....	38

(iii)

B. As Recent Developments Have Shown, There Are Less Drastic Means Than Fair Trade For Protecting Small Retailers .....	42
Conclusion .....	45
Appendix A — Senate Bill No. 1084, Legislative Counsel's Digest .....	1a

## TABLE OF AUTHORITIES

Cases:	Page
<i>Allstate Insurance Co. v. Lanier</i> , 361 F.2d 870 (4th Cir), cert. denied 385 U.S. 930 (1966) .....	19
<i>Asheville Tobacco Board of Trade, Inc. v. Federal Trade Commission</i> , 263 F.2d 502 (4th Cir. 1959) .....	18, 19
<i>Bates v. State Bar of Arizona</i> , 433 U.S. 350 (1977) .....	5, 12, 16, 17
<i>California v. LaRue</i> , 409 U.S. 109 (1972) .....	22, 36
<i>Cantor v. Detroit Edison Co.</i> , 428 U.S. 579 (1976) ....	5, 8, 9, 10, 11, 12, 15, 16
<i>Capiscean Corp. v. Alcoholic Beverage Control Appeals Board</i> , 87 Cal. App. 3d 996 (1979) .....	8
<i>Castlewood International Corp. v. Simon</i> , 596 F.2d 638 (5th Cir. 1979) .....	26
<i>City of Lafayette v. Louisiana Power &amp; Light Co.</i> , 435 U.S. 389 (1978) .....	12
<i>Clark Distilling Co. v. Western Maryland R. Co.</i> , 242 U.S. 311 (1917) .....	23
<i>Craig v. Boren</i> , 429 U.S. 190 (1976) .....	22, 34, 42
<i>Dean Milk Co. v. Madison</i> , 340 U.S. 349 (1951) .....	36
<i>Gas Light Co. v. Georgia Power Co.</i> , 440 F.2d 1135 (5th Cir. 1971), cert. denied 404 U.S. 1062 (1972) .....	19
<i>George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.</i> , 424 F.2d 25 (1st Cir.), cert. denied, 400 U.S. 850 (1970) .....	19
<i>Goldfarb v. Virginia State Bar</i> , 421 U.S. 773 (1975) ..	5, 10, 11, 12, 16
<i>Hospital Building Co. v. Trustees of Rex Hospital</i> , 425 U.S. 738 (1976) .....	32

	Page
<i>Hostetter v. Idlewild Bon Voyage Liquor Corp.</i> , 377 U.S. 324 (1964) .....	26, 32, 33, 34
<i>Joseph E. Seagram &amp; Sons, Inc. v. Hostetter</i> , 384 U.S. 35 (1966) .....	30, 31, 32
<i>Mahoney v. Joseph Triner Corp.</i> , 304 U.S. 401 (1938) .....	28
<i>Mandeville Island Farms, Inc. v. American Crystal Sugar Co.</i> , 334 U.S. 219 (1948) .....	32
<i>National Railroad Passenger Corp. v. Miller</i> , 358 F. Supp. 1321 (D.C. Kan.), <i>aff'd</i> 414 U.S. 948 (1973) .....	34
<i>New Motor Vehicle Board v. Orrin W. Fox Co.</i> , 439 U.S. 96 (1978) .....	12
<i>Norman's on the Waterfront, Inc. v. Wheatley</i> , 444 F.2d 1011 (3d Cir. 1971) .....	18
<i>Northern Pacific R. Co. v. United States</i> , 356 U.S. 1 (1958) .....	35
<i>Parker v. Brown</i> , 317 U.S. 341 (1943) .....	2, 5, 10, 15
<i>Rice v. Alcoholic Beverage Control Appeals Board</i> , 21 Cal. 3d 431 (1978) .....	<i>passim</i>
<i>Sail'er Inn, Inc. v. Kirby</i> , 5 Cal. 3d 1 (1971) .....	32
<i>Schwegmann Bros. v. Calvert Distillers Corp.</i> , 341 U.S. 384 (1951) .....	6, 9, 10, 11, 27
<i>State Board of Equalization v. Young's Market Co.</i> , 299 U.S. 59 (1936) .....	28
<i>United States v. Frankfort Distilleries, Inc.</i> , 324 U.S. 293 .....	21, 28, 29, 30, 32
<i>United States v. Topco Associates</i> , 405 U.S. 596 (1972) .....	35



	<u>Page</u>
<i>United States v. Von's Grocery Co.</i> , 384 U.S. 270 (1966) .....	45
<i>Wickard v. Filburn</i> , 317 U.S. 111 (1942) .....	32
<i>Ziffrin, Inc. v. Reeves</i> , 308 U.S. 132 (1939) .....	28
<b>Constitutional Provisions:</b>	
<i>United States Constitution</i>	
Art. I, Sec. 8, cl. 3 (Commerce Clause) ...	2, 3, 20, 21, 26, 27, 31, 33
Art. VI (Supremacy Clause) .....	30
Twenty-first Amendment, section 2 .....	2, 3, 20-28, 30-34, 37, 42, 46
<b>Statutes</b>	
Consumer Goods Pricing Act of 1975, Pub. L. 94-145, 89 Stat. 801 (1975) .....	20, 43
McGuire Act, Pub. L. 82-542, 66 Stat. 631 (1952) (formerly 15 U.S.C. § 45 (a)(2)-(a)(5)) .....	20, 30
Miller-Tydings Act, 50 Stat. 693 (1937) (formerly the provisos to 15 U.S.C. § 1) .....	10, 20, 30
Robinson-Patman Act, 48 Stat. 526 (1936) (15 U.S.C. § 13) .....	30
Sherman Antitrust Act (15 U.S.C. §§ 1-7) .....	2, 3, 4, 9, 10, 13, 19, 20, 28-32, 34, 35, 37, 38
Webb-Kenyon Act (27 U.S.C. § 122) .....	20, 22-25, 30
<b>California Business &amp; Professions Code</b>	
§§ 17043-17044 .....	17
§ 24400 .....	45
§ 24749 .....	6, 9, 35, 37, 39
§ 24755(g) .....	44
1978 Cal. Stats. Ch. 359, Section 2, item 132 .....	8

<b>Legislative Materials:</b>	<u>Page</u>
76 Cong. Rec. 4138-4174, 4518-4526 (1933) .....	23-25, 27
<i>Alcohol and the State: A Reappraisal of California's Alcohol Control Policies</i> (Program Review Branch), Audit Division, California Department of Finance (1974) .....	26, 39, 40
<i>Analysis of the Budget Bill of the State of Cali- fornia for the Fiscal Year July 1, 1979, to June 30, 1980</i> (Office of the Legislative Analyst) .....	8
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Senate Select Committee on Laws Relating to Alcoholic Beverages, ALCOHOLISM: A CALIFORNIA STATE SENATE REPORT	
Vol. I Final Report .....	44
Vol. III The Alcoholic Beverage Industry .....	39, 44
<b>Publications:</b>	
P. Areeda and D. Turner, I ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION (1978) .....	13, 14, 15
R. Bunce, <i>Alcoholic Beverage Consumption, Beverage Prices and Income in California 1952 - 1975</i> (Social Research Group, University of California - Berkley School of Public Health, California Office of Alcoholism Report No. 6, 1976) .....	40
Handler, "Antitrust - 1978," 78 COLUM. L. REV. 1363 (1978) .....	14
NEW YORK STATE MORELAND COMMISSION ON THE ALCOHOLIC BEVERAGE CONTROL LAW, Report and Recommendations No. 3, "Mandatory Resale Price Maintenance" (1964) .....	39, 42

Page

Note, " <i>Parker v. Brown</i> Revisited: The State Action Doctrine After <i>Goldfarb, Cantor</i> , and <i>Bates</i> ," 77 COLUM. L. REV. 898 (1977) .....	14
Note, "The Supreme Court, 1975 Term," 90 HARV. L. REV. 1 (1976) .....	12, 14
Note, "The Twenty-First Amendment Versus the Interstate Commerce Clause," 55 YALE L.J. 815 (1946) .....	22
E. Österberg, "The Pricing of Alcoholic Beverages as an Instrument of Social Policy," SOCIAL RESEARCH INSTITUTE OF ALCOHOL STUDIES REPORT No. 83 (Helsinki, Finland 1975) .....	41, 42
Posner, "The Proper Relationship Between State Regulation and the Federal Antitrust Laws," 49 N.Y.U. L. REV. 693 (1974) .....	14, 15
Schmidt and Popham, "The Single Distribution Theory of Alcohol Consumption: A Rejoinder to the Critique of Parker and Harman," 39 Q.J. STUDIES ON ALCOHOL 400 (1978) .....	41
Simon, "The Price Elasticity of Liquor in the U.S. and a Simple Method of Determination," 34 ECONOMETRICA 198 (1966) .....	41

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BAXTER RICE as Director of the Department  
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*Respondent.*

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**AMICUS CURIAE BRIEF OF  
 CONSUMERS UNION OF UNITED STATES, INC.  
 IN SUPPORT OF RESPONDENT**

---

**Interest of Amicus Curiae**

The interest of *amicus curiae* Consumers Union is set forth in the accompanying motion for leave to file this brief.

### Questions Presented

1. Is the "state action" exemption of *Parker v. Brown* available when, as in this case, the State compels private parties to fix the wholesale and retail prices of a commodity but exercises no independent review over these pricing decisions?

2. Does a State have plenary power under section two of the 21st Amendment to legislate with respect to liquor in disregard of all federal statutes enacted pursuant to the Commerce Clause, or must state liquor legislation that conflicts with the federal antitrust laws be evaluated against them to determine which law should prevail?

3. Did the California Supreme Court correctly accommodate state and federal interests when it held in *Rice* that the California liquor fair trade law failed to achieve its principal purpose of promoting temperance and was an unnecessarily broad means of protecting small retailers, and must therefore fall before the paramount national policy embodied in the Sherman Act?

### SUMMARY OF ARGUMENT

Each aspect of the California Supreme Court's decision in *Rice* was correct, and because the decision below was based entirely upon *Rice*, it should be affirmed.

*Rice* was correct when it ruled that the State's fair trade laws for liquor are not immunized from antitrust attack by the "state action" doctrine of *Parker v. Brown*, 317 U.S. 341 (1943). In order to obtain "state action" immunity, any private person relying upon state law must, under the decisions of this Court and the lower federal courts, satisfy three tests. First, the private anticompetitive conduct at issue must be compelled by the State; it is not enough that the State contemplates or en-

courages such conduct. Second, the conduct compelled must be in furtherance of a clear state policy; it is not enough if the State acquiesces in a program for which the real impetus comes from private parties. Third, the State must actively review the private conduct; it is not sufficient if the State compels anticompetitive acts but retains no supervision over their substance. While the statutes at issue here arguably satisfy the first two of these tests (although there is evidence that both the Legislative and Executive branches in California do not wish to enforce and no longer enforce fair trade), they clearly do not satisfy the third. The fair trade laws for wine, like those for liquor, contain no mechanism for review by the State of the prices set by producers.

California's wine fair trade laws also cannot escape invalidation by reliance upon section two of the 21st Amendment. The 1933 Congressional debates over the language that became the Amendment show that the sole purpose of section two was to insure that the "dry" States would remain "dry" by writing into the Constitution the language of the Webb-Kenyon Act. There is no evidence that the Amendment was intended to do anything more than overrule the decisions by which this Court in the 19th Century gradually eroded, through the Commerce Clause, the States' power to legislate with respect to liquor.

This Court's decisions construing the 21st Amendment are consistent with the Amendment's legislative history. They recognize that where a State seeks to limit importation or improper diversion of alcoholic beverages through means that would offend traditional Commerce Clause notions, it has broad power to do so. However, this Court has always reserved decision over the issue of whether state liquor legislation can prevail when it conflicts with the Sherman Act, and its decisions



suggest that when such a conflict arises, it must be resolved through an accommodation of state and federal interests like that reached in *Rice*.

The accommodation process used by the California Supreme Court in *Rice* was constitutionally sound, and the result reached under it was supported by the evidence. In holding that it must consider not only the State's purposes but also its means of achieving them, the California Supreme Court was merely acknowledging the reality that although the promotion of temperance is said to be liquor fair trade's principal goal, the evidence is that per capita consumption of alcoholic beverages has steadily increased in the State for more than 25 years, and that the increase has been especially dramatic in the case of wine. Further, in holding that it could properly consider whether less anticompetitive means were available to achieve the State's secondary purpose of protecting small retailers, the Court in *Rice* used an analysis that is well-established in other areas of constitutional law and that correctly anticipated what would happen in the marketplace. As the Director of California's Department of Alcoholic Beverage Control has testified, there is no evidence to suggest that a single small retailer has had to go out of business as a result of the *Rice* decision, or that the value of the retailers' licenses has declined. Finally, the California Legislature has recently enacted a bill that will enable small liquor retailers to form buying cooperatives, and thus take advantage of the quantity discounts now available only to their larger competitors.

There is nothing that can be said in defense of California's fair trade laws for alcoholic beverages. They compel a *per se* violation of the Sherman Act, have eliminated interbrand competition, do not promote

temperance, and are an unnecessarily broad means of protecting small retailers. For all of these reasons, the Court below and the California Supreme Court in *Rice* ruled correctly when they invalidated these laws.

## ARGUMENT

### I. THE "STATE ACTION" DOCTRINE DOES NOT IMMUNIZE CALIFORNIA'S WINE FAIR TRADE LAWS AGAINST A SHERMAN ACT ATTACK, BECAUSE THERE IS NO INDEPENDENT REVIEW BY THE STATE OF THE PRICES SET BY WINE PRODUCERS.

In *Rice v. Alcoholic Beverage Control Appeals Board*, the California Supreme Court carefully reviewed this Court's decisions on the "state action" exemption and concluded that the exemption did not apply to the State's liquor fair trade laws. *Rice* acknowledged that two of the three conditions for exemption laid down by this Court had been met, because (1) the State clearly compelled the conduct at issue, as required by *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), and (2) the fixing of retail prices was not merely acquiesced in by the State, but carried out a clear state policy, as required by *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976). Nonetheless, the Court held that the exemption was unavailable because the State did not exercise any review over the prices set by producers. Noting that such independent review had been present in both of the cases in which this Court held the "state action" exemption to apply, *Parker v. Brown*, 317 U.S. 341 (1943) and *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), the California Supreme Court said:

[T]he state plays no role whatever in setting the retail prices. The prices are established by

the producers according to their own economic interests, without regard to any actual or potential anticompetitive effect; the state's role is restricted to enforcing the prices specified by the producers. There is no control, or "pointed re-examination," by the state to insure that the policies of the Sherman Act are not "unnecessarily subordinated" to state policy . . . [W]e would be extending the decisions of the United States Supreme Court beyond their intended design if we were to hold . . . that this scheme is immune from the Sherman Act. 21 Cal.3d at 445.

Petitioner challenges this ruling. It contends that in view of the statement of policy contained in section 24749 of the California Business and Professions Code,<sup>1</sup> the fact that price posting is required by state law and is part of a complex regulatory scheme is enough, without more, to bring California's wine price posting laws within the "state action" exemption.

This contention is plainly wrong. It has been clear since this Court's decision in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951), that a state law which compels private anticompetitive conduct is not beyond the reach of the Sherman Act. Of course, as respondent has shown in its memorandum on the California Attorney General's *amicus curiae* brief,<sup>2</sup> there is a serious issue in this case whether the State of

<sup>1</sup>Section 24749 is quoted in full on page 45 of petitioner's opening brief. It provides that liquor fair trade laws are necessary "for the purpose of fostering and promoting temperance," and to "eliminate price wars which unduly stimulate the sale and consumption of alcoholic beverages and disrupt the orderly sale and distribution thereof."

<sup>2</sup>Memorandum in Response to Motion of State Attorney General to Present Oral Argument in Support of Petitioner and Suggestion of Mootness, filed November 26, 1979 (hereinafter referred to as "Respondent's Memorandum re Attorney General").

California can any longer be said to compel wholesale and retail price posting for wine. Even if the State still does compel such conduct, however, it is clear from this Court's decisions that the "state action" exemption does not apply. These decisions teach that "state action" immunity is available only where, in addition to compelling private conduct, the State has also created a mechanism to provide independent and meaningful review of that conduct so as to insure that federal antitrust policy is not unnecessarily subordinated to state goals. Because the statutes at issue here do not provide for such review, they are not entitled to a "state action" immunity.

**A. The Failure Of The State To Seek Review Of Cases Striking Down Fair Trade, And The Decision Of The Legislature To Eliminate Funding For Fair Trade Enforcement, Raise Serious Doubts About Whether Fair Trade Continues To Be Part Of California's Alcohol Control Policies.**

As the Respondent has pointed out in its Memorandum re Attorney General, California's wine fair trade laws come before this Court with an unusually complex procedural history.

First, the petitioner here is not the Department of Alcoholic Beverage Control ("ABC"), the state agency charged with enforcing the laws, but a private trade association that represents less than one-half of California's liquor retailers.<sup>3</sup>

<sup>3</sup>The petition for a writ of certiorari states that petitioner represents "over 3000 independent retail liquor establishments" (page 9). The State of California has about 11,000 retail liquor store licenses outstanding. Respondent's Memorandum re Attorney General, App. B, page 4.

Second, the ABC has not sought review of another decision by the California Court of Appeal in which the laws at issue here were held invalid on antitrust grounds.<sup>4</sup> Thus, the ABC's inaction, in addition to raising a serious issue of collateral estoppel, shows that the Executive branch of the California State government has no desire to enforce liquor fair trade.

The Executive branch is not alone in this respect. Within two weeks after the California Supreme Court's decision in *Rice*, the State Legislature eliminated \$115,000 from the ABC's budget and specified that no state funds were to be spent in enforcing the laws that *Rice* had declared invalid. See *Analysis of the Budget Bill of the State of California for the Fiscal Year July 1, 1979 to June 30, 1980* (Report of the Legislative Analyst to the Joint Legislative Budget Committee) page 219; 1978 Cal. Stats. Ch. 359, §2, item 132, page 29.

We submit that in view of this substantial hostility to fair trade, California can no longer be said either to compel wine price posting, or to deem it central to the State's policies of alcohol control.

The only decision of this Court to consider a similar issue is in accord with our view. In *Cantor v. Detroit Edison Co.*, *supra*, the Court was called upon to decide whether the State of Michigan had any policy with respect to competition in the lightbulb market. The Court concluded the State did not, for even though Michigan did require compliance with the tariff in which Detroit Edison's lightbulb program was included, no

<sup>4</sup>*Capiscean Corp. v. Alcoholic Beverage Control Appeals Board*, 87 Cal. App. 3d 996 (1979). The full text of this decision is annexed to the petition for a writ of certiorari as Appendix D.

state statute supported the practice, and the Michigan Legislature had never conducted an investigation of or made findings about the adequacy of competition in the lightbulb market. 428 U.S. at 584-585. Thus, *Cantor* teaches that in determining whether a State truly compels anticompetitive private conduct, one should look to the totality of the State's actions in an area, and not merely to the applicable statutes.

Once the totality of the State's actions is examined here, we think it clear that this case does not really present a "state action" issue.

#### **B. California's Decision To Compel Wine Producers To Set Prices For Their Products Is Not Enough, Standing Alone, To Exempt The Price Posting Laws From Antitrust Scrutiny.**

Even if section 24749 of the Business and Professions Code can still be accepted as a valid statement of California's current policy on fair trade for wine, it is nonetheless clear that petitioner's principal "state action" argument is without merit. This Court has long rejected the contention that a state law is immune from challenge under the Sherman Act merely because it *compels* anticompetitive conduct by private parties, and petitioner has suggested no reason why this holding should be reconsidered.

The first decision to reject petitioner's compulsion argument was *Schwegmann Bros. v. Calvert Distillers Corp.*, *supra*. In that case, the issue before the Court



was the validity of Louisiana's "non-signer" fair trade law. The statute's validity had been challenged by a Louisiana retailer, who contended that the non-signer provision was in conflict with the Sherman Act. This Court agreed, holding that the non-signer provision, by compelling the retailer to adhere to a fixed price to which it had not agreed, went well beyond the limited exemption for fair trade laws granted by Congress in the Miller-Tydings Act.

In his opinion for the Court, Mr. Justice Douglas stressed that if the Louisiana non-signer law were upheld, it would allow distributors to enforce a scheme of horizontal price-fixing at the retail level, even though horizontal price fixing was expressly excluded from the anticompetitive arrangements made lawful by the Miller-Tydings Act. Mr. Justice Douglas did not believe that this horizontal price fixing was made any less objectionable by the fact that it was brought about through the compulsion of state law rather than through actual agreement among retailers. Citing *Parker v. Brown*, *supra*, Mr. Justice Douglas said:

[W]hen a state compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids . . .

[W]hen retailers are *forced* to abandon price competition, they are driven into a compact in violation of the spirit of the proviso [of the Miller-Tydings Act] which forbids "horizontal" price fixing. 341 U.S. at 389 (citations omitted).

If there was any doubt after *Schwegmann* that state law compulsion is not enough to exempt private conduct from scrutiny under the antitrust laws, that doubt was dispelled in *Cantor v. Detroit Edison Co.*, *supra*. In that case, the defendant public utility argued that its pro-

gram of distributing lightbulbs to customers without making a separate charge enjoyed a "state action" immunity because the program was set forth in a tariff of the Michigan Public Service Commission, which defendant was *obliged* to follow. In support of its argument, the defendant relied upon the same language in *Goldfarb v. Virginia State Bar* relied upon by petitioner in this case, namely the passage that

the threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign. 421 U.S. at 790.

The *Cantor* Court rejected the compulsion argument. The plurality opinion, after noting that "this Court has never sustained a claim that otherwise unlawful private conduct is exempt from the antitrust laws because it was permitted *or required* by state law," 428 U.S. at 600 (emphasis supplied), concluded that the defendant had read *Goldfarb* too broadly. Noting that compulsion was described in *Goldfarb* as the "threshold inquiry" of "state action" analysis. Mr. Justice Stevens said:

Certainly that careful use of language could not have been read as a guarantee that compliance with any state requirement would automatically confer federal antitrust immunity. *Id.*

Mr. Justice Blackmun's concurring opinion in *Cantor* reached the same conclusion. Relying expressly upon *Schwegmann*, he said:

It cannot be decisive . . . simply that a state law goes so far as to require, rather than simply to authorize, the anticompetitive conduct in question. The Court accepted this as a prereq-

uisite to antitrust immunity in *Goldfarb* . . . but it alone cannot be sufficient. The whole issue in *Schwegmann* was whether the State *could* require obedience to a fixed resale price arrangement. *Id.* at 609 (citations omitted).

This Court's rejection of compulsion as a sufficient condition for "state action" immunity finds ample support from academic commentators. As one of them said in reviewing *Cantor*:

Compulsion would be a singularly inappropriate test for antitrust immunity. Most important, if compulsion were itself sufficient to justify an antitrust exemption, a state could simply order its citizens to violate the Sherman Act without providing alternative safeguards for antitrust interests, thereby vitiating the policies served by the federal statute. Note, "The Supreme Court, 1975 Term," 90 HARV. L. REV. 1, 236 (1976).

**C. California's Failure To Provide For Independent State Review Of The Prices Set By Wine Producers Precludes Application Of The "State Action" Exemption In This Case.**

Although this Court has explored the contours of the "state action" exemption five times within the past four years,<sup>5</sup> it has not yet ruled upon the question presented in this case: whether state law that compels private anticompetitive conduct is exempt from the reach of the

<sup>5</sup>*Goldfarb v. Virginia State Bar*, *supra*; *Cantor v. Detroit Edison Co.*, *supra*; *Bates v. State Bar of Arizona*, *supra*; *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978); *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96 (1978).

Sherman Act if it fails to provide for meaningful independent review by the State of that conduct.

Although the issue has not been directly addressed in this Court before, it has been considered many times by the lower federal courts and by academic commentators, and there is a rare agreement among them that without independent state review, the "state action" exemption should not apply. In their recent treatise on the law of antitrust, Professors Turner and Areeda have provided an excellent summary of why independent state review should be required in cases where the State compels private parties to engage in conduct that would otherwise violate the antitrust laws:

The adequate supervision requirement responds directly to the federalism concerns that are at the core of *Parker*. It also reflects an attempt to reconcile those concerns with the policies behind the Sherman Act. The basic premise of the antitrust laws is that the market should both direct and constrain private behavior. To that end, competition must be robust, and free of anticompetitive restraints. On the other hand, the antitrust laws provide no basis for distinguishing those areas of the economy where the market should be allowed to direct economic activity from those where other concerns warrant public control. The existence of a state action immunity enables states, like the federal government itself, to define areas inappropriate for market control. Moreover, the adequate supervision criterion ensures that state-federal conflict will be avoided in those areas in which the state has demonstrated its commitment to a program through its exercise of regulatory oversight. At the same time, it guarantees that when the



Sherman Act is set aside, private firms are not left to their own devices. Rather, immunity will be granted only when the state has substituted its own supervision for the economic constraints of the competitive market. P. Areeda and D. Turner, I ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶213, p. 73 (1978) (footnotes omitted).

Other academic commentators have reached the same conclusion for the same reasons. See Posner, "The Proper Relationship Between State Regulation and the Federal Antitrust Laws," 49 N.Y.U. L. REV. 693, 720-723 (1974); Handler, "Antitrust — 1978," 78 COLUM. L. REV. 1363, 1381 (1978); Note, "*Parker v. Brown* Revisited: The State Action Doctrine After *Goldfarb*, *Cantor*, and *Bates*," 77 COLUM. L. REV. 898, 916 (1977); Note, "The Supreme Court, 1975 Term," 90 HARV. L. REV. 1, 237 (1976).

The California Supreme Court's opinion in *Rice* bears eloquent witness to the need for independent state review. As indicated by the price data the Court considered, liquor fair trade in California had resulted by 1978 not only in the elimination of intrabrand competition, but in the virtual extinction of competition between brands as well. 21 Cal.3d at 454-456. This kind of price-fixing is precisely the evil at which the antitrust laws are aimed, and the only way to avoid it is by requiring that when prices are set under the auspices of state law, the prices are reviewed by the State to insure that the values served by the antitrust laws are not unnecessarily sacrificed.<sup>6</sup>

<sup>6</sup>Because California's liquor fair trade laws provide no mechanism of any kind for review of the prices set by producers, this case does not present the question of how active and extensive

The need for independent state review of private anticompetitive conduct has been a theme running through all of this Court's "state action" decisions. In *Parker v. Brown*, *supra*, for example, Chief Justice Stone pointed out that the raisin marketing plan at issue in the case had been put into effect only after a state commission, the Agricultural Prorate Advisory Commission (whose members were appointed by the Governor and confirmed by the State Senate), had held public hearings and made findings of fact that institution of the marketing program would not result in excessive profits to raisin producers. 317 U.S. at 346. The Court relied heavily upon this extensive state involvement in holding that the raisin marketing plan was exempt from scrutiny under the Sherman Act.

In *Cantor v. Detroit Edison Co.*, *supra*, the need for independent state review was met because the defendant utility was carefully regulated by the Michigan Public Service Commission. This Court denied a "state action" immunity not because the State failed to supervise, but because the State did not have a policy of replacing competition with regulation in the lightbulb market. However, Mr. Justice Blackmun's concurring opinion in *Cantor* considered the general circumstances under which state laws should be exempt from the reach of the Sherman Act. He concluded that a "particularly strong

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the State's supervision must be. This issue is one on which the academic commentators have divided sharply. Compare Posner, *supra*, at 49 N.Y.U.L. REV. 723-726 (favoring remand to state administrative agencies that have not carefully evaluated the antitrust implications of their decisions) with P. Areeda and D. Turner, *supra* ¶213c, pp. 75-76 (eschewing inquiry into the adequacy of the State's supervision unless it is so slight as to constitute an evasion of the antitrust laws). Consumers Union believes that "state action" immunity should not be granted unless the State's review is meaningful, and more than a rubber-stamp for private decisionmaking.



justification" exist for a "state action" exemption when a State chooses to substitute its own regulation for the forces of competition and *actively supervises* the private conduct that it compels. See 428 U.S. at 611.

Of all this Court's recent decisions, *Bates v. State Bar of Arizona* speaks most clearly to the issue of independent state review. The case is particularly significant because its procedural posture was very much like that in this case; i.e. a direct challenge to state law uncomplicated by the troublesome question of whether a private party who merely obeys state law can be held liable for treble damages.

In *Bates*, the Court began its "state action" discussion by observing that the "threshold" test for immunity was met because the anti-advertising rule at issue was the "affirmative command" of the Arizona Supreme Court, the ultimate body wielding the State's power over the practice of law. Thus, in *Goldfarb's* words, the rule was "compelled by direction of the State acting as sovereign." 433 U.S. at 360.

After finding compulsion, *Bates* went on to discuss two arguments raised by petitioners that were based upon *Cantor*. The first was that the anti-advertising rule was based upon the American Bar Association's Code of Professional Responsibility, and should not be immune from challenge merely because the organized bar had been successful in persuading the Arizona Supreme Court to adopt it. This Court rejected the argument because the petitioners' claim was clearly against the State, and the degree of private influence on the State's decision was irrelevant. *Id.* at 361.

The second argument in *Bates* based upon *Cantor* was that the rule should be subject to antitrust challenge

because it was not "tailored so as to intrude upon the federal interest to the minimum extent necessary." *Id.* This Court rejected that argument for two reasons. First, the rule involved the competence and integrity of the bar, a matter of obvious state concern, and was "a clear articulation of the State's policy with regard to professional behavior." *Id.* at 362. But equally important, the rule's application was subject to continuous review by the Arizona Supreme Court. Emphasizing this last point, *Bates* said:

[T]he rules are subject to pointed re-examination by the policymaker — the Arizona Supreme Court — in enforcement proceedings. Our concern that federal policy is being unnecessarily and inappropriately subordinated to state policy is reduced in such a situation; we deem it significant that the state policy is so clearly and affirmatively expressed and that the State's supervision is so active. *Id.*

As the California Supreme Court held in *Rice*, California's fair trade laws for alcoholic beverages are noteworthy precisely because they lack "active supervision" by the State or any opportunity for "pointed re-examination" by state officials to determine whether the laws serve their purported goals. State approval is not required before the prices fixed by producers go into effect, the prices are not subject to modification by the ABC or any other state agency, and state officials lack the power even to establish maximum or minimum prices.<sup>7</sup> The fair trade laws for wine are even more rigid

<sup>7</sup>Only the California Unfair Practices Act (Business and Professions Code Sections 17043-17044), which generally prohibits a retailer from selling merchandise below acquisition cost plus a six percent markup, appears to place any floor under retail liquor prices.

than those for distilled spirits, because they authorize producers to set wholesale as well as minimum retail prices. A scheme more conducive to antitrust law violations is difficult to imagine.

When the lower federal courts have been asked to rule upon statutes like those described in the preceding paragraph, they have invalidated them because of the lack of supervision and review by independent government officials. In *Norman's on the Waterfront, Inc. v. Wheatley*, 444 F.2d 1011 (3d Cir. 1971), for example, the Third Circuit invalidated the liquor fair trade law of the Virgin Islands because the Territory had provided no mechanism for review of the wholesale and retail prices set by liquor producers.<sup>8</sup> In holding that the Virgin Islands statute was not entitled to a "state action" exemption, the Third Circuit emphasized that the Territorial liquor authority had "no power to approve, disapprove, or modify the prices fixed by private persons." 444 F.2d at 1018.

Similarly, in *Asheville Tobacco Board of Trade, Inc. v. Federal Trade Commission*, 263 F.2d 502 (4th Cir. 1959), the Fourth Circuit rejected a claim that anticompetitive actions taken by a tobacco buyers' board-of-trade were immune from challenge by the Federal Trade Commission merely because the board had been established under state law. The Court pointed out that the board's members were not state officials, but private tobacco traders in competition with each other. Holding that private conduct must be "adequately supervised by independent state officials", and that anticompetitive conduct is justifiable only when it is "state action, not

<sup>8</sup>The Virgin Islands statute was very similar to that at issue in *Rice* and in this case. See 444 F.2d at 1013.

individual action masquerading as state action," the Court denied antitrust immunity. 263 F.2d at 509.

See also, *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25, 30 (1st Cir.) cert. denied 400 U.S. 850 (1970) ("state action" immunity is appropriate only when "government determines that competition is not the *summum bonum* in a particular field and deliberately attempts to provide an alternate form of public regulation"); *Gas Light Co. v. Georgia Power Co.*, 440 F.2d 1135 (5th Cir. 1971), cert. denied 404 U.S. 1062 (1972) (immunity granted where the programs at issue had been ordered into effect only after adversary hearings before and modification by the Georgia Public Service Commission); *Allstate Insurance Co. v. Lanier*, 361 F.2d 870 (4th Cir.), cert. denied 385 U.S. 930 (1966) (immunity granted where auto insurance rates suggested by a rating bureau had been approved by the State Insurance Commissioner and were subject to modification by him).

Clearly, the California Supreme Court in *Rice* and the court below in this case acted in accordance with the overwhelming weight of authority when they held that California's liquor fair trade laws cannot find shelter under a "state action" umbrella. The authorities on which these courts relied are sound, for they strike a reasonable balance between the States' need to regulate particular industries and the public's interest in ensuring that the values protected by competition are not trampled upon in the name of regulation. For all of these reasons, the ruling below on the "state action" issue should be affirmed.<sup>9</sup>

<sup>9</sup>Because the "state action" exemption is unavailable here, California's fair trade laws for alcoholic beverages are subject to scrutiny under the Sherman Act. When Congress repealed the Miller-



**II. SECTION TWO OF THE 21ST AMENDMENT DOES NOT CONFER POWER UPON THE STATES TO ENACT LIQUOR LEGISLATION WITHOUT REGARD TO THE SHERMAN ACT, BUT REQUIRES INSTEAD THAT AN ACCOMMODATION BE REACHED BETWEEN THE STATE'S INTEREST IN ENFORCING ITS LIQUOR LAWS AND THE FEDERAL INTEREST IN ENFORCING THE SHERMAN ACT.**

Petitioner and the *amici curiae* supporting its position have devoted substantial portions of their briefs to an attack upon the discussion of the 21st Amendment in *Rice*. They appear to argue that section two of the 21st Amendment<sup>10</sup> confers upon the States power to legislate with respect to liquor in total disregard of *all* legislation enacted by Congress pursuant to the Commerce Clause (U.S. Const., Art. I, Sec. 8, cl. 3). Thus, they continue, it was improper for the California Supreme Court to consider whether the State's resale price maintenance laws for liquor are in conflict with the Sherman Act, or to attempt any method of resolving this conflict.

Despite their extensive discussion of the legislative history of the 21st Amendment, the Webb-Kenyon and

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Tydings and McGuire Acts in 1975 (Consumer Goods Pricing Act of 1975, Pub. L. 94-145, 89 Stat. 801), it restored the rule that vertical resale price maintenance arrangements are a *per se* violation of section 1 of the Sherman Act. As respondent Midcal demonstrates in its brief, Congress intended no exception from this rule for alcoholic beverages, and resale price maintenance laws for liquor can therefore escape invalidation only if they are based upon a legitimate use of state power under the 21st Amendment. That issue is considered in Parts II and III of this brief.

<sup>10</sup>Section 2 provides in full: "The transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

Wilson Acts, and the decisions of this Court construing the 21st Amendment, it is clear that petitioner and the *amici curiae* supporting its position are wrong. Read as a whole, the legislative history of the 21st Amendment shows that section two was included in the Amendment for the single, limited purpose of ensuring that the "dry" States would have the legislative power Congress believed they needed to remain "dry." In proposing the 21st Amendment for ratification by the States, Congress did *not* intend that in the event of conflict, state liquor legislation would automatically prevail over *any* federal statute enacted pursuant to the Commerce Clause, no matter how important it might be to national economic regulation.

It is equally clear from the decisions of this Court that state liquor legislation which conflicts with the antitrust laws does not automatically prevail over those laws. Since *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293 (1944), this Court has expressly reserved decision over the question of whether such state legislation will be upheld. Other decisions of this Court recognize that in view of the limited purpose of section two, the proper method of resolving such a conflict is to accommodate where possible the State's interest in enforcing its liquor legislation with the strong federal interest in enforcing the Sherman Act. As shown in Part III of this brief, the California Supreme Court reached a reasonable accommodation in *Rice* because of its finding that the liquor fair trade laws frustrated the Sherman Act without doing anything to further the state policies behind them. Because the same frustration of federal goals and failure to achieve state goals is present with respect to wine fair trade laws, they must also be struck down.



**A. The Legislative History Of The 21st Amendment Leaves No Doubt That The Sole Purpose Of Section Two Was To Allow The "Dry" States To Remain "Dry."**

In recent years, several opinions from this Court have reviewed the legislative history of the 21st Amendment in order to determine its proper scope. These opinions have concluded that in offering section two to the States for ratification, Congress' primary purpose was to remove all doubt about the "dry" States' legal power to remain "dry" by writing into the Constitution the provisions of the Webb-Kenyon Act.<sup>11</sup> *Craig v. Boren*, 429 U.S. 190, 205-206 (1976); *California v. LaRue*, 409 U.S. 109, 134 (1972) (Marshall, J., dissenting). Academic commentators have reached the same conclusion. See Note, "The Twenty-First Amendment Versus the Interstate Commerce Clause," 55 YALE L. J. 815, 816-818 (1946).

A complete review of the Amendment's legislative history shows that this reading is correct. All of the members of Congress who spoke concerning section two during the debates agreed that it was designed to allow "dry" States to have the necessary legislative power to keep liquor out of their borders; there is no evidence to indicate that Congress intended section two to have any other effect.

Senator Blaine was the manager on the Senate Floor of Senate Joint Resolution 211, the Senate amend-

<sup>11</sup>The Webb-Kenyon Act of 1913 prohibits "[t]he shipment or transportation . . . of any . . . intoxicating liquor of any kind, from one State, Territory, or District . . . into any other State, Territory, or District . . . [for the purpose of being] received, possessed, sold, or in any manner used . . . in violation of any law of such State, Territory, or District . . ." 27 U.S.C. § 122.

ments to which included the language that was ultimately ratified as the 21st Amendment.<sup>12</sup> In his introductory remarks, Senator Blaine noted that the constitutionality of the Webb-Kenyon Act had been upheld by a divided Court in *Clark Distilling Co. v. Western Maryland R. Co.*, 242 U.S. 311 (1917), and that the purpose of section two of the Joint Resolution was to remove any doubt that might remain about the Act's constitutionality:

[T]o assure the so-called dry States against the importation of intoxicating liquor into those States, it is proposed to write per-

<sup>12</sup>The Senate Judiciary Committee amended S.J. Res. 211 to read as follows:

That the following article is hereby proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States:

**"ARTICLE**

**"SECTION 1.** The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

**"SEC. 2.** The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

**"SEC. 3.** Congress shall have concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold.

**"SEC. 4.** This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress." 76 Cong. Rec. 4138-4139,

manently into the Constitution a prohibition along that line. 76 Cong. Rec. 4141.

Senator Blaine then elaborated further on why the Senate Judiciary Committee desired to include section two in the Amendment:

The committee felt that since the Congress had acted and had definitely legislated upon this question [in the Webb-Kenyon Act], while that legislation had been sustained by the Supreme Court, yet it was sustained by a divided court, and that we could well afford to guarantee to the so-called dry States the protection designed by section 2.

I am opposed to the dry States interfering with the so-called wet States in connection with this question of intoxicating liquors; and so, by the same token, I am willing to grant to the dry States a full measure of protection, and thus prohibit the wet States from interfering in their internal affairs respecting the control of intoxicating liquors. *Id.*

Later during the Senate debate, Senator Fess stated his understanding of the meaning of section two:

In other words, the second section of the joint resolution that is now before us is designed to permit the Federal authority to assist the States that want to be dry to remain dry. I am in favor of that. 76 Cong. Rec. 4168.

Shortly after Senator Fess spoke, Senator Robinson of Arkansas proposed an amendment to strike out section two. Senator Borah, a supporter of the Joint Resolution, opposed the motion, repeating the point that section two was the only sure way to remove doubt about

the constitutionality of the Webb-Kenyon Act. After noting that President Taft had vetoed the Act because of his belief that it was unconstitutional, and that many other fine lawyers had shared these views, Senator Borah said that without the language of section two,

we are turning the dry States over for protection to a law which is still of doubtful constitutionality and which, as it was upheld by a divided court, might very well be held unconstitutional upon a re-presentation of it. Secondly, we are asking the dry States to rely upon the Congress of the United States to maintain indefinitely the Webb-Kenyon law. 76 Cong. Rec. 4170.

Senator Borah then examined the Commerce Clause decisions by which this Court in the 19th Century had gradually eroded the States' power to legislate with respect to liquor, and urged once again that section two remain in the Amendment. Thereafter, Senator Robinson withdrew his motion to delete it. 76 Cong. Rec. 4171.

Aside from the discussion described above, the language of section two received little consideration in the Congressional debates.<sup>13</sup> No more was necessary, because the limited purpose of the section was clear. Instead, most of the time in both the House and Senate was spent on two other questions: (1) whether the Amendment should be ratified by state legislatures or conventions, and (2) whether section three of the Joint

<sup>13</sup>Remarks about section two in the less extensive House debates tracked those in the Senate. See, e.g., 76 Cong. Rec. 4518 (Rep. Robinson), 4526 (Rep. Tierney).

Resolution was necessary for the purpose of preventing the "return of the saloon."<sup>14</sup>

In its *amicus curiae* brief in support of petitioner, the Virginia Beer Wholesalers Association has placed heavy reliance upon remarks made during the Senate debate about section three of the Joint Resolution<sup>15</sup> to support the argument that section two of the Amendment gives the States power to enact legislation that conflicts with *any* federal statute based upon Congress' power to regulate interstate commerce. In taking this position, the Association is echoing similar statements made in the dissenting opinion in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964), in which Mr. Justice Black argued that the deletion of section three showed that section two was designed to confer upon the States power to legislate without regard to normal Commerce Clause limitations.<sup>16</sup>

Opposing *amicus curiae* is wrong. It is evident that the fears expressed during the debates about section three

<sup>14</sup>In opposing the "return of the saloon," the members of Congress in 1933 were not describing bars as we know them today. Instead, they were opposed to the bars of the pre-Prohibition period, which were often owned by aggressive breweries or distillers and in which prostitution and gambling flourished on a scale unheard of now. *Alcohol and the State: A Reappraisal of California's Alcohol Control Policies* (Program Review Branch), Audit Division, California Department of Finance (1974), pp. 3, 5-6. If the Court grants the motion to file this brief, copies of this report will be lodged with the Clerk for the convenience of the Court.

<sup>15</sup>As noted above, section three of S.J. Res. 211 provided that "Congress shall have concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold."

<sup>16</sup>See also *Castlewood International Corp. v. Simon*, 596 F.2d 638, 642 (5th Cir. 1979).

cannot operate to enlarge the limited power to remain "dry" that is granted the States by section two. As this Court observed in *Schwegmann Bros. v. Calvert Distillers Corp.*, *supra*, the fears of the opponents of legislation — or of constitutional amendments — are not a reliable guide to construction. 341 U.S. at 394-395. The supporters of Joint Resolution 211 said again and again in the debates that section three was not intended to qualify the States' legislative powers under section two, but was included only for the purpose of giving Congress the residual power to outlaw saloons. See, e.g., 76 Cong. Rec. 4155 (Sen. Walsh), 4156, 4161, 4174 (Sen. Norris). Moreover, section three was deleted from the Amendment that was ultimately submitted to the States for ratification. The language of a provision deleted from a constitutional amendment cannot define the scope of language included in the amendment.

Because the legislative history makes it clear that section two of the 21st Amendment was designed only to allow the "dry" States to remain "dry," any support for the argument that section two confers "absolute" power upon the States to legislate in disregard of important federal laws passed under the Commerce Clause must come from the decisions of this Court, to which we now turn.



**B. This Court's Decisions Under The 21st Amendment Recognize That State Liquor Legislation Is Not Automatically Valid If It Conflicts With The Sherman Act, But Must In Each Case Be Considered Against The Sherman Act To Determine Which Law Should Prevail.**

In the first decade after ratification of the 21st Amendment, most of this Court's decisions construing the Amendment involved efforts by the States to limit the importation or improper diversion of alcoholic beverages by imposing license restrictions and taxes. In *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936), for example, the Court sustained a \$500 annual license fee upon those who imported beer into California. Similarly, in *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1938), the Court upheld a Minnesota law that prohibited the importation into Minnesota of brands of liquor containing more than 25% alcohol unless they were registered with the U.S. Patent Office. And in *Ziffrin, Inc. v. Reeves*, 308 U.S. 132 (1939), the Court sustained a Kentucky statute that denied a license to an interstate carrier who exported liquor from the State on the ground that the state law was reasonably calculated to prevent improper diversion of the liquor into Kentucky.

It was not until 1944, in *United States v. Frankfort Distilleries, Inc.*, *supra*, that the Court considered a contention that the Sherman Act was in conflict with state liquor legislation and must give way to it. The United States had indicted a group of liquor wholesalers, retailers, and producers located in Colorado, who were charged with having agreed among themselves to fix and increase wholesale and retail liquor prices by entering in-

to fair trade contracts, and by coercing others to do the same. This Court upheld the defendants' conviction on the ground that their activities were not authorized by the Colorado Fair Trade law, which permitted vertical agreements for resale price maintenance but forbade horizontal or coercive price fixing agreements. 324 U.S. at 299. The Court repeatedly emphasized that there was no conflict between the federal antitrust laws and the Colorado law.

In *Frankfort Distilleries*, both the opinion of the Court and the concurring opinion of Mr. Justice Frankfurter raised the question of what would happen in a case in which the Sherman Act was in actual conflict with state liquor legislation. In his concurring opinion, Mr. Justice Frankfurter hypothesized a case in which state liquor laws provided for resale price maintenance through horizontal agreement:

If a State for its own sufficient reasons deems it a desirable policy to standardize the price of liquor within its border either by a direct price-fixing statute or by permissive sanction of such price-fixing in order to discourage the temptations of cheap liquor due to cutthroat competition, the Twenty-first Amendment gives it that power and the Commerce Clause does not gainsay it. Such state policy can not offend the Sherman Law even though distillers or middlemen agree with local dealers to respect this policy. 324 U.S. at 301.

Mr. Justice Black's opinion for the Court was not willing to go so far. He cautioned:

We . . . do not have here a case in which the Sherman Act is applied to defeat the policy of the state. That would raise questions of mo-

ment which need not be decided until they are presented. 324 U.S. at 299.

Clearly, although Mr. Justice Frankfurter thought it self-evident that laws of the kind at issue in this case should be sustained,<sup>17</sup> a majority of this Court reserved decision on the question.

The Court was not confronted with another claim of conflict between the Sherman Act and state liquor legislation until *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966). In that case, liquor distillers, wholesalers and importers mounted a broad-based constitutional attack on the newly-enacted New York affirmation statute. One of the plaintiffs' contentions was that the affirmation statute was invalid under the Supremacy Clause (U.S. Const., Art. VI) because the state law conflicted with the Sherman Act and the Robinson-Patman Act. Writing for the Court, Mr. Justice Stewart rejected the argument because he found that the New York law did not actually require any conduct forbidden under the Court's antitrust decisions. 384 U.S. at 45-46. However, he also noted that the statute was challenged on its face, and that circumstances could be envisioned under which the statute as applied would compel violations of the Robinson-Patman Act. *Id.* at 46. He concluded that the Court would deal with such conflicts if and when they arose. *Id.* at 52.

Both petitioner and the Virginia Beer Wholesalers Association claim to find support for their position in *Seagram*, and especially in its statements that "the Twenty-first Amendment demands wide latitude for regulation by the State" (384 U.S. at 42), and (quoting

<sup>17</sup>At least before repeal of the Miller-Tydings and McGuire Acts.

*Hostetter*) that "a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders." *Id.*

A careful reading of the *Seagram* case discloses that it will not support the interpretation that petitioner and *amicus* place upon it. First, if it were true that state liquor legislation automatically prevails over the federal antitrust laws in a case in which the two statutory schemes conflict, it would have been pointless for the *Seagram* Court to consider whether, in fact, the affirmation statute compelled antitrust law violations. Second, the passage about the States being "totally unconfined by traditional Commerce Clause limitations" appears *not* in the portion of the opinion that discussed the Sherman Act, but in that section which considered whether the affirmation statute unduly burdened interstate commerce.

We submit that it is no accident this language appears in one section of the opinion and not the other. For as we have shown in the discussion of the 21st Amendment's legislative history, Congress intended section two of the Amendment to exempt States seeking to remain "dry" from the "traditional Commerce Clause limitations" by which this Court in the 19th Century had reduced the States' power to legislate with respect to liquor.<sup>18</sup> When the Amendment was ratified in 1933, the antitrust laws could not have been considered such a "traditional Commerce Clause limitation," because this Court had not yet finished developing the "affection"

<sup>18</sup>Consumers Union has been informed that these decisions and the Commerce Clause theory supporting them will be reviewed in detail in respondent's brief.

theory of interstate commerce by which the Sherman Act's scope has been expanded.<sup>19</sup>

**C. Rice Correctly Held That in Cases Where State Liquor Legislation And The Sherman Act Conflict, The 21st Amendment Requires That Each Statute Be Evaluated In The Light Of Its Purposes And Its Efficacy In Achieving Them, And That The Most Important Interest Be Allowed To Prevail.**

Although it is clear from the decisions in *Frankfort Distilleries* and *Seagram* that state liquor legislation does not automatically prevail in the event it conflicts with the Sherman Act, those cases do not suggest how such a conflict should be resolved. When the California Supreme Court was confronted with this question in *Rice*, it looked to other 21st Amendment decisions (including its own in *Sail'er Inn, Inc. v. Kirby*, 5 Cal.3d 1 (1971)), which it read as sanctioning a process of accommodation, in which the purposes behind the state and federal laws are considered, a judgment is made as to whether the laws are effective in achieving their purposes, and the most important interest is allowed to prevail.

The first decision to suggest such an analysis was, of course, *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, *supra*. In that case, the issue was whether the State of New York could prohibit the plaintiff from engaging in its business of selling liquor to New York airline

<sup>19</sup>*Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 743 n.2 (1976); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 229-235 (1948); *Wickard v. Filburn*, 317 U.S. 111, 118-129 (1942).

passengers bound for foreign destinations. The liquor was delivered to the passengers only after their arrival in the foreign countries.

This Court held that the New York liquor licensing statute could not be used to prohibit this arrangement, because to do so would interfere with the plaintiff's right to engage in business under laws administered by the United States Bureau of Customs, laws that had been enacted pursuant to the Commerce Clause. The Court rejected New York State's argument that section two of the 21st Amendment had worked a "repeal" of the Commerce Clause. After discussing a number of the cases decided in the years immediately after ratification, the Court said:

To draw a conclusion from this line of decisions that the Twenty-first Amendment has somehow operated to "repeal" the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be *an absurd oversimplification*. If the Commerce Clause had been *pro tanto* "repealed," then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor. *Such a conclusion would be patently bizarre and is demonstrably incorrect.* . . .

Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case. 377 U.S. at 331-332 (citations omitted; emphasis supplied).

Because this Court has not faced a conflict like that in *Rice* until now, it has not had occasion to engage in the



accommodation process suggested by *Hostetter*. But the Court's recent decision in *Craig v. Boren, supra*, makes it clear that in an appropriate case, the Court would use such an analysis. In *Craig*, Mr. Justice Brennan's opinion for the Court reviewed the decisions under the 21st Amendment and, citing *Hostetter*, said:

The wording of § 2 of the Twenty-first Amendment closely follows the Webb-Kenyon and Wilson Acts, expressing the framers' clear intention of constitutionalizing the Commerce Clause framework established under those statutes. This Court's decisions since have confirmed that the Amendment primarily created an exception to the normal operation of the Commerce Clause. . . . Even here, however, the Twenty-first Amendment does not *pro tanto* repeal the Commerce Clause, but merely requires that each provision "be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." 429 U.S. at 205-206 (footnotes and citations omitted).<sup>20</sup>

Neither *Hostetter* nor *Craig* suggests how the accommodation process works in a case where state liquor legislation conflicts with the Sherman Act. However, it seems clear that the process must begin, as *Rice* held,

<sup>20</sup>Both petitioner and the Virginia Beer Wholesalers Association argue that this Court's summary affirmance of the decision in *National Railroad Passenger Corp. v. Miller*, 358 F. Supp. 1321 (D.C. Kan.), *aff'd*, 414 U.S. 948 (1973) indicates an abandonment of the accommodation process referred to in *Hostetter* and *Craig*. This contention is incorrect, because the District Court in that case held that there was no conflict between the Rail Passenger Act and the Kansas Liquor Control Act. 358 F. Supp. at 1329. Without a direct conflict between state and federal law, there is no need for accommodation, and the *National Railroad Passenger Corp.* case therefore has no bearing on the issues here.

with an inquiry into the purposes purportedly served by the state and federal statutes. 21 Cal.3d at 451. In this case, that is neither a difficult nor a subjective exercise, because statutes and judicial decisions clearly define the purposes of the Sherman Act and California's fair trade laws for alcoholic beverages. As *Rice* noted, section 24749 of the Business and Professions Code defines the purposes of liquor fair trade as the "promotion of temperance" and the elimination of "price wars which unduly stimulate the sale and consumption of alcoholic beverages."

The purposes of the Sherman Act and its importance to our national economy are clearly defined by decisions of this Court. As the Court said in *United States v. Topco Associates*, 405 U.S. 596, 610 (1972), the Sherman Act is "the Magna Carta of free enterprise," and is "as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." The purpose of this vital statute was further elucidated in *Northern Pacific R. Co. v. United States*, 356 U.S. 1 (1958). In that case, this Court emphasized that the Sherman Act is

aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition. 356 U.S. at 4.

The California Supreme Court was correct in holding that where such an important national policy is concerned, the accommodation process cannot end with an inquiry into the purposes behind the conflicting state and federal statutes. Instead, a reviewing court must also ask how well the statutes carry out their respective purposes. This Court used such an approach in *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951), in which the issue was whether a Madison, Wisconsin ordinance that placed restrictions on who could sell milk with the city was an undue burden on interstate commerce. The Court assumed that a milk licensing ordinance could be a valid exercise of the city's police power, but it rejected the argument that the ordinance must be upheld if its purpose was permissible. Instead, the Court said, it was necessary to determine the practical effects of the ordinance, and whether the city's purpose could be achieved by less drastic means. 340 U.S. at 354.

Consideration of how well the state and federal statutes serve their respective purposes is also suggested by Mr. Justice Stewart's concurring opinion in *California v. LaRue*, *supra*. Although acknowledging that section two gives the States broad power to legislate with respect to liquor, Justice Stewart cautioned that the Amendment does not empower a State "to act with total irrationality or invidious discrimination in controlling the distribution and dispensation of liquor within its borders." 409 U.S. at 120, n.\* Deciding whether a State has done that requires, in most cases, that the practical effects of a liquor statute be considered, and that a determination be made as to whether it is reasonably calculated to achieve its declared ends.

When read "in the context of the issues and interests at stake," the California Supreme Court's decision in

*Rice* on the scope of the 21st Amendment is a carefully limited one. It requires only that where state liquor legislation clearly contravenes important national economic policies such as the Sherman Act, the State cannot use the Amendment as an absolute shield, but must demonstrate that its laws are effective in achieving temperance or some other state goal reasonably related to the original purpose of the Amendment.

With this holding and method of accommodation in mind, we turn to the question of whether, in this case and in *Rice*, a proper accommodation was reached between the Sherman Act and California's fair trade laws for liquor.

**III. RICE WAS CORRECT WHEN IT CONCLUDED THAT THE SHERMAN ACT MUST PREVAIL OVER CALIFORNIA'S FAIR TRADE LAWS FOR LIQUOR, BECAUSE THE LATTER STATUTES HAVE FAILED TO PROMOTE TEMPERANCE AND ARE AN UNNECESSARILY DRASTIC MEANS OF PROTECTING SMALL RETAILERS.**

After concluding that the "state action" exemption was unavailable and that the 21st Amendment required an accommodation process, the California Supreme Court in *Rice* undertook the analysis described in the preceding section. It began by noting that the liquor fair trade laws resulted in a clear frustration of the Sherman Act because they compelled a violation of a *per se* rule, and because the evidence showed substantial uniformity of price among brands of liquor sold in the State. 21 Cal.3d at 453-456. The Court then asked whether the laws had helped to achieve either of the purposes stated for them in Business and Professions Code section 24749, the promotion of temperance and the prevention of "price wars." The Court concluded that the laws were



not reasonably calculated to achieve these ends, because there was *no* evidence to indicate that fair trade had helped to promote temperance, and because measures that did less violence to the Sherman Act were available to protect small liquor retailers from "price wars" and other predatory practices by large retail chains. 21 Cal.3d at 456-459.

As all parties in this case acknowledge, the judgment in *Rice* is long since final, and thus not subject to review by this Court. Even if *Rice* were now before the Court, however, we doubt that its resolution of the state-federal conflict would be subject to review, because that resolution turned upon questions of state law, as to which the California Supreme Court is the final authority. Nonetheless, because we believe that *Rice's* resolution of the conflict between the Sherman Act and liquor fair trade was sound, the final portion of this brief is devoted to a discussion of evidence relevant to the temperance issue, and to a discussion of developments since *Rice* in the marketplace and in the California Legislature. This evidence leaves no doubt that the California Supreme Court was correct in holding that fair trade has not promoted temperance, that less restrictive means are available to protect small retailers, and that the paramount national policy of competition embodied in the Sherman Act must therefore prevail.

#### **A. The Evidence Is Clear That Liquor Fair Trade Laws Do Not Promote Temperance.**

The decision by Consumers Union to participate as *amicus curiae* in *Rice* was not reached quickly, for in addition to its long-standing opposition to fair trade laws, Consumers Union has been concerned for many

years with the problems associated with alcohol abuse. The decision to participate was made when it became apparent that resale price maintenance laws for liquor have not prevented a substantial increase in per capita consumption of all types of alcoholic beverages, even though, as noted above, the promotion of temperance is declared by statute to be fair trade's principal purpose. Business & Professions Code section 24749.

The California Supreme Court extensively reviewed data on alcohol consumption in its decision. It cited the conclusions of a major investigation conducted by the California Senate,<sup>21</sup> as well as a 1974 study by the California Department of Finance which found that per capita consumption of distilled spirits in California had increased by 42% between 1950 and 1972.<sup>22</sup> The Court also noted that studies in other States, such as that conducted in 1963 by New York's Moreland Commission, had also found no correlation between liquor resale price maintenance laws and the promotion of temperance. 21 Cal.3d at 457-458.

*Rice's* conclusion about the ineffectiveness of fair trade in promoting temperance holds even more true for wine than for distilled spirits. The data considered by the California Supreme Court (and other evidence not before it) show that per capita increases in wine consumption have been many times greater than those for distilled spirits.

The point is well illustrated by a table that appeared in the Department of Finance study cited in *Rice*:

<sup>21</sup>Senate Select Committee on Laws Relating to Alcoholic Beverages, *ALCOHOLISM: A CALIFORNIA STATE SENATE REPORT*, Vol. III, "The Alcoholic Beverage Industry," page 69.

<sup>22</sup>*Alcohol and the State: A Reappraisal of California's Alcohol Control Policies*, *supra*, page 15.



APPARENT PER CAPITA CONSUMPTION OF ALCOHOLIC  
BEVERAGES: CALIFORNIA, 1950-1972<sup>23</sup>

(Gallons)

Year	Distilled spirits	Beer	Dry wine	Sweet wine	Sparkling wine
1950	2.6	21.8	0.9	2.0	0.04
1955	2.5	21.6	1.2	1.9	0.06
1960	2.8	22.5	1.5	1.7	0.09
1965	3.3	24.2	2.1	1.5	0.16
1970	3.6	26.9	3.3	1.1	0.33
1971	3.7	27.3	3.7	1.1	0.33
1972	3.7	28.4	4.1	1.1	0.35

Percentage  
Change

(1950-1972) +42% +30% +356% -45% +775%

The same conclusion was reached in research conducted at the School of Public Health at the University of California. A study there found that per capita increases in wine consumption exceeded the consumption increases for all other alcoholic beverages in California between 1952 and 1975, and did so although the price of wine generally kept pace with increases in the Consumer Price Index.<sup>24</sup>

<sup>23</sup>This table, which was derived from the Governor of California's Budget for 1973-1974, appeared on page 15 of *Alcohol and the State: A Reappraisal of California's Alcohol Control Policies*, *supra*.

<sup>24</sup>R. Bunce, *Alcoholic Beverage Consumption, Beverage Prices and Income in California 1952-1975* (Social Research Group, University of California-Berkeley School of Public Health, California Office of Alcoholism Report No. 6, 1976), pp. 7-8. If the Court grants the motion to file this brief, copies of this paper will be lodged with the Clerk for the convenience of the Court. We must point out that alcohol researchers are divided over the significance of per capita consumption statistics. Some argue that such figures are not significant because in any population, a large percentage of

Undaunted by the statistics on per capital consumption, some defenders of fair trade have argued that it is a reasonable marketing system because the demand for alcoholic beverages is price-elastic (i.e. sensitive to price, so that an increase in price will bring about a corresponding decrease in consumption). The available data do not support such a sweeping generalization. Economists who have attempted to compute price elasticities for liquor have reached widely varying results,<sup>25</sup> and the only economist who has looked specifically at California has found the demand for liquor there to be quite *inelastic* with respect to price.<sup>26</sup>

In any event, alcohol researchers have become very cautious in recent years about placing much reliance on elasticity studies. They point out that long- and short-term elasticities differ, that demand elasticities for liquor are heavily influenced by fast-changing social and cultural trends, and that the values computed are no better than the data on which they are based.<sup>27</sup> At least

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the alcohol sold is consumed by a relatively small number of people. But a growing number of researchers contend that per capita data is significant because consumption by heavy drinkers is proportional to per capita consumption. *See generally*, Schmidt and Popham, "The Single Distribution Theory of Alcohol Consumption: A Rejoinder to the Critique of Parker and Harman," 39 Q.J. STUDIES ON ALCOHOL 400 (1978).

<sup>25</sup>A summary of price and income elasticities appears on page 6 of a study by the ABC entitled "Report to Joint Legislative Committees on Minimum Retail Price Posting" (January 1, 1977). If the Court grants the motion to file this brief, copies of this study will be lodged with the Clerk for the convenience of the Court.

<sup>26</sup>Simon, "The Price Elasticity of Liquor in the U.S. and a Simple Method of Determination," 34 *Econometrica* 198 (1966).

<sup>27</sup>E. Österberg, "The Pricing of Alcoholic Beverages As An Instrument of Social Policy," SOCIAL RESEARCH INSTITUTE OF ALCOHOL STUDIES REPORT No. 83 (Helsinki, Finland, 1975). If the Court grants the motion to file this brief, copies of this report will

one economist who had concluded that the demand for liquor is price-elastic has changed his mind.<sup>28</sup>

Although consumption data and elasticity studies are significant, perhaps the most telling bit of evidence in *Rice* on the temperance issue came from the actions of the California Attorney General. Despite numerous opportunities to do so, he did not come forward with a single piece of evidence to support the temperance promotion rationale. We submit that if, after nearly 40 years of experience, the State cannot supply any evidence to support the main assumption on which liquor resale price maintenance is based, it has indeed exercised its powers under the 21st Amendment with "total irrationality." *Craig v. Boren* at 429 U.S. 215 (Stewart, J., concurring in the judgment).

**B. As Recent Developments Have Shown,  
There Are Less Drastic Means Than  
Fair Trade For Protecting Small  
Retailers.**

Events since mid-1978 have shown that the California Supreme Court was also correct in its holding that the other purpose of liquor resale price maintenance, the protection of small retailers, can be achieved by

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be lodged with the Clerk for the convenience of the Court. Mr. Österberg is not surprised that elasticity values vary because "elasticities are not inherent attributes of alcoholic beverages" (page 4). Thus, he is very skeptical about the use of price-fixing to control consumption. Pages 10-11. Baxter Rice, Director of the California ABC, also puts little stock in econometric studies. See Respondent's Memorandum Re Attorney General, App. B, page 12.

<sup>28</sup>See NEW YORK STATE MORELAND COMMISSION ON THE ALCOHOLIC BEVERAGE CONTROL LAW, Report and Recommendations No. 3, "Mandatory Resale Price Maintenance" (1964), pp. 20-21, 35-39 (statement of Professor Karl B. Marx).

methods other than fair trade. Contrary to the gloomy predictions of petitioner and others, large numbers of small retailers have not gone out of business since *Rice*, and (as discussed below) the California Legislature has recently enacted a statute that will authorize small retailers to form buying cooperatives. This measure promises to eliminate the disparities in purchasing power that have made it difficult for small liquor stores to compete with large retail chains.

In *Rice*, the California Supreme Court placed great emphasis upon the evidence that led Congress in 1975 to repeal the Miller-Tydings and McGuire Acts.<sup>29</sup> In particular, the Court was impressed by the finding that the failure rate among small businesses was 55% greater in fair trade States than "free trade" States, while the growth rate for small retailers had been 32% greater in States that had not enacted or had repealed fair trade laws. 21 Cal.3d at 456.

Experience in the marketplace since *Rice* confirms that the abolition of fair trade need not be fatal to small liquor stores. As Baxter Rice has recently testified, there is no evidence to indicate that a single retailer has gone out of business as a result of the California Supreme Court's decision. Moreover, the number of retail store license transfers is about the same, and the average price paid for these licenses has declined by no more than 10%.<sup>30</sup>

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<sup>29</sup>Consumer Goods Pricing Act of 1975, Pub. L. 94-145, 89 Stat. 801 (1975).

<sup>30</sup>Respondent's Memorandum re Attorney General, App. B, pp. 3, 31-32. Appendix B contains the full text of the testimony Mr. Rice gave at hearings on liquor regulation held in New Jersey on February 9, 1979. This appendix will hereafter be referred to as the "New Jersey Hearings."



Consumers Union has not been surprised by these developments, because we argued throughout the *Rice* litigation that fair trade was not essential to the survival of "mom and pop" liquor stores. First, unlike many large retailers, "mom and pops" offer convenience, for which consumers will pay a premium. Second, as the California Supreme Court noted, California law contains ample prohibitions against "loss leader" sales practices by retail chains. 21 Cal.3d at 457 n. 24, 458. See also Business & Professions Code §24755(g). The abolition of fair trade has therefore not left small retailers without protection against predatory price cutting, and experience in the marketplace since *Rice* confirms that such "price wars" have not occurred. New Jersey Hearings, pp. 10-11.

One thing that did trouble Consumers Union during its involvement in *Rice* was the disparity in purchasing power between "mom and pop" stores and the large retail chains. Some of the State's major retailers (such as Safeway Stores and Thrifty Drugs) have as many as 400 retail liquor licenses. New Jersey Hearings, page 4. As a result, they alone are able to take advantage of the quantity discounts offered by California's liquor wholesalers, who will sell a case for several dollars less when a customer purchases 50 or more cases. Other students of the liquor industry have also been troubled by this disparity, and urged the California Senate as early as 1973 to enact legislation that would authorize small retailers to form cooperatives. The Senate Select Committee holding the hearings included a recommendation to that effect in its Final Report.<sup>31</sup>

<sup>31</sup>Senate Select Committee on Laws Relating to Alcoholic Beverages, *supra*, Vol. I p. 85, Vol. III p. 67. The interest in cooperatives was spurred by the success they have enjoyed in the

We are pleased to inform the Court that the California Legislature has recently enacted and the Governor has signed a bill adding section 24400 to the Business and Professions Code. This section will authorize retailers to form cooperatives beginning on January 1, 1980. The full text of the bill appears in Appendix A to this brief. While its ultimate success in equalizing purchasing power must await further developments, Consumers Union believes that the measure will go a long way in enabling the "mom and pops" to compete on a more equal footing with large retailers.

### CONCLUSION

The decision below to strike down California's wine fair trade laws is correct and should be affirmed. As was the case in *Rice*, the laws have caused California consumers to pay excessively high prices for wine, and have done so without providing any countervailing social benefit in the form of reduced consumption.

By bringing the fair trade issue to this Court, petitioner is trying to turn back the clock. The evidence shows that *Rice* has introduced some much-needed competition into the California liquor market, and has done so without the dire consequences to small retailers that petitioner and others had predicted. Moreover, decisions by the California Legislature and the Governor show that they no longer want fair trade, and prefer instead to let all retailers compete on an equal footing.

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grocery business, where group buying has allowed independent grocers to compete very effectively with the chains. See *United States v. Von's Grocery Co.*, 384 U.S. 270, 298-300 (1966) (Stewart, J., dissenting).



In view of all that has transpired since *Rice*, the wine fair trade laws could escape invalidation only through a very broad application of the "state action" doctrine, or by an equally broad interpretation of the 21st Amendment. But as we have shown, the great weight of authority is against petitioner on the "state action" question, and the view of the 21st Amendment espoused by petitioner would expand that provision far beyond the intentions of the Congress that framed it. For these reasons and the others set forth above, the judgment below should be affirmed in all respects.

Respectfully submitted,

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## APPENDIX A

### Senate Bill No. 1084

#### CHAPTER 455

An act to add Section 24400 to the Business and Professions Code, relating to alcoholic beverages.

[Approved by Governor September 5, 1979. Filed with  
Secretary of State September 5, 1979]

#### LEGISLATIVE COUNSEL'S DIGEST

SB 1084, Carpenter. Alcoholic beverages.

Existing law prohibits an on- or off-sale alcoholic beverage licensee from purchasing alcoholic beverages for resale from any person other than a person licensed as a manufacturer, wine grower, rectifier, or wholesaler. Tied house restrictions contained in the Alcoholic Beverage Control Act prohibit retail licensees from also holding an interest in any other type of alcoholic beverage license.

This bill would authorize 2 or more alcoholic beverage retail licensees of the same type to agree to group purchase distilled spirits from a wholesaler or rectifier through a designated agent under specified conditions.

*The people of the State of California do enact as follows:*

SECTION 1. Section 24400 is added to the Business and Professions Code, to read:

24400. Notwithstanding any other provision of law, two or more retail licensees of the same type may agree to group purchase distilled spirits from a licensed

wholesaler or rectifier through a designated agent, subject to the following restrictions:

(a) The designated agent shall hold a retail license of the same type operating a premises in the same county or counties as the purchasing group.

(b) No retailer shall have more than one designated agent nor shall an agent make purchases for more than one group.

(c) The merchandise purchased for each group shall be delivered to and stored in either a single licensed premises or a single warehouse located in the same county as the premises of the purchasing group and such delivery shall be a single delivery within two consecutive business days at the discount in effect on the day the delivery was commenced. Saturday, Sunday, and holidays shall not be deemed business days.

(d) A record of purchase shall be made by the agent on a master purchase order. Each purchasing retailer shall furnish the designated agent with a signed order setting forth such licensee's purchase, to be attached to and become a part of the master order. Master and individual orders shall be maintained in compliance with Section 25752 and fiscal liability shall extend in so far as the amount of the purchase designated and delivered for each individual retailer of the purchasing group is subject to the provisions of Section 25509.

(e) The merchandise shall be deemed to have been deemed to have been received by each retailer member of the purchasing group when delivered to the designated premises.

(f) When a group buying member has not made payment in full by the expiration of the 30th day from date of delivery or has not paid the one percent charge at the expiration of the 30th day from the date the charge became due, such group buying member shall be expelled

led from the buying group and prohibited from rejoining that group or joining any other such group until such time that all payments have been received for the merchandise sold and delivered to such retailer more than 30 days previously.

**In the Supreme Court**

OF THE

**United States**

OCTOBER TERM, 1979

**No. 79-97**

CALIFORNIA RETAIL LIQUOR DEALERS ASSOCIATION,  
a California corporation,  
*Petitioner*

vs.

MIDCAL ALUMINUM, INC., a California corporation,  
*Respondent*

BAXTER RICE, as Director of the Department of  
Alcoholic Beverage Control of the State of California  
*Respondent*

On Writ of Certiorari to the Court of Appeal of the  
State of California in and for the Third Appellate District

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**BRIEF OF AMICUS CURIAE  
STATE OF CALIFORNIA  
IN SUPPORT OF PETITIONER**

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GEORGE DEUKMEJIAN

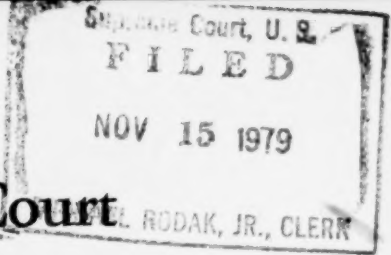
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## SUBJECT INDEX

	<u>Page</u>
Questions presented .....	1
1. Is a state prevented by the Sherman Act from requiring fair trade pricing for purely intrastate sales of alcoholic beverages by wholesale and retail licensees, particularly in view of the Parker v. Brown "state action" exemption? .....	1
2. Did Congress intend by repeal of the Miller-Tydings and McGuire Acts to have any effect on a state's right to regulate wholesale and retail fair trade pricing practices of its intrastate alcoholic beverage licensees? .....	1, 2
3. Aside from the Parker v. Brown "state action" exemption, does a state have a plenary right under the Twenty-first Amendment to require fair trade pricing practices for the purely intrastate sales of alcoholic beverages by wholesale and retail licensees? .....	2
Statutes involved .....	2
California Constitution, Article XX, Section 22 .....	2
California Business and Professions Code, Sections 24755, 24862, 24866 .....	2
Summary of argument .....	2
Statement of the case .....	5
Background .....	5
The instant case .....	7
Argument .....	10
I	
The California Alcoholic Beverage Fair Trade Statutes are valid under the Parker v. Brown exemption to the Sherman Act .....	10
A. True state action is involved in the instant case .....	12
B. The State action in the instant case is fully within the Parker v. Brown exemption to the Sherman Act .....	12
C. The matter here regulated, Alcoholic Beverage Fair Trade Laws, is relevant to the question of relationship of the parties to this lawsuit .....	20
II	
Repeal of the Miller-Tydings and McGuire Acts did not affect the validity of State Fair Trade Laws relating to alcoholic beverages .....	22
III	
The Twenty-First Amendment must be balanced against the Commerce clause itself, not against statutes such as the Sherman Act which are enacted under the Commerce clause ..	26
Conclusion .....	34

## TABLE OF AUTHORITIES CITED

Cases	Page
Allied Properties v. Department of Alcoholic Beverage Control, 53 Cal.2d 141 (1959) .....	21
Bates v. State Bar of Arizona, 433 U.S. 350 (1977) .....	4, 14, 16, 17, 20, 21
Big Boy Liquors Ltd. v. Alcoholic Beverage Control Appeals Board, 71 Cal.2d 1226 (1969) .....	21
California v. La Rue, 409 U.S. 109 (1972) .....	31, 32
Cantor v. Detroit Edison Co., 428 U.S. 579 (1976) .....	14, 15, 16, 17, 20
Craig v. Boren, 429 U.S. 190 (1976) .....	30, 31
Dick v. United States, 208 U.S. 340 (1908) .....	26
Duplex Printing Press Company v. Deering, 254 U.S. 433, 474 (1921) .....	25
Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) .....	13
Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) .....	4, 14, 15, 16, 17
Hitchcock v. Collenberg, 140 F.Supp. 894 (D. Md. 1956) .....	13
Hostetter v. Idlewild Liquor Corp., 377 U.S. 324 (1964) .....	28, 30
Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978) .....	14
Lowenstein v. Evans (C.C.D.S.C.) 69 F. 908 (1895) .....	11
Marshall v. Barlows, Inc., 436 U.S. 307 (1978) .....	32
Midcal Aluminum, Inc. v. Rice, 90 Cal.App.3d 979 (1979) .....	5, 7, 9, 22, 36
National Railroad Passenger Corporation v. Harris, 490 F.2d 572 (10th Cir. 1974) .....	30
National Railroad Passenger Corporation v. Miller, 358 F.Supp. 1321 (D.Kan. 1973) .....	30
New Motor Vehicle Board of California v. Orrin W. Fox Co., 439 U.S. 96 (1978) .....	4, 14, 17, 19
Northern Pacific Railway Co. v. United States, 356 U.S. 1 (1958) .....	7
Olsen v. Smith, 195 U.S. 332 (1904) .....	11
Parker v. Brown, 317 U.S. 341 (1942) .....	1, 2, 4, 10, 11, 12, 13, 14, 17, 19, 22, 35
Rice v. Alcoholic Beverage Control Appeals Board (Rice), 21 Cal.3d 431 (1978) .....	2, 3, 4, 5, 6, 7, 9, 20, 21, 22, 23, 24, 25, 30, 34, 35, 36

## TABLE OF AUTHORITIES CITED

CASES	Page
Richardson v. Ramirez 418 U.S. 24 (1974) .....	26
Samson Market Co. v. Alcoholic Beverage Control Appeals Board, 71 Cal.2d 1215 (1969) .....	21
Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951) .....	13
Seagram and Sons v. Hostetter, 384 U.S. 35 (1966) .....	28
Ullman v. United States, 350 U.S. 422 (1956) .....	26
United States v. Frankfort Distilleries, Inc., 324 U.S. 282 (1945) .....	26
Wilke Holzheiser, Inc. v. Department of Alcoholic Beverage Control, 65 Cal.2d 349 (1966) .....	21
Wisconsin v. Constantineau, 400 U.S. 433 (1971) .....	30
<b>Constitutions</b>	
California Constitution:	
Article XX, Section 22 .....	25
United States Constitution:	
First Amendment .....	31
Fourth Amendment .....	32
Fourteenth Amendment .....	28, 30, 31
Twenty-First Amendment .....	2, 4, 5, 27, 28, 29, 30, 31, 33, 34
<b>Statutes</b>	
California Business and Professions Code:	
Section 23000 et seq. ....	6
Section 24755 .....	6
Section 24862 .....	2
Section 24866 .....	2
Stats. 1939, ch. 278 .....	6
Consumer Goods Pricing Act of 1975:	
89 Stat. 801 .....	22
Maryland State Medical Practice Act .....	13
McGuire Act of 1952:	
66 Stat. 631 .....	22
Miller-Tydings Act of 1937:	
50 Stat. 693 .....	22
Sherman Act:	
15 U.S.C. 1 et seq. ....	2

## TABLE OF AUTHORITIES CITED

## Texts

	<u>Page</u>
77 Columbia Law Review 898 (1977) . . . . .	13
29 Hastings Law Review 211 (1977) . . . . .	13

## Other Authorities

121 Cong. Rec. 38049 (1975) (remarks of Sen. Brooke) . . . . .	25
H.R. 6971, 94th Cong., 1st Sess. (1975) . . . . .	25
Report of the House Committee on the Judiciary on the Consumer Goods Pricing Act of 1975, 94th Cong., 1st Sess., Report No. 94-341, July 9, 1975 . . . . .	4, 25
S. 408, 94th Cong., 1st Sess. (1975) . . . . .	25
Report of the Senate Committee on the Judiciary on the Consumer Goods Pricing Act of 1975, 94th Cong., 1st Sess., Report No. 94-466, November 20, 1975 . . . . .	23, 24

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OCTOBER TERM, 1979

**No. 79-97**

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BAXTER RICE, as Director of the Department of  
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On Writ of Certiorari to the Court of Appeal of the  
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**BRIEF OF AMICUS CURIAE  
STATE OF CALIFORNIA  
IN SUPPORT OF PETITIONER**

---

**QUESTIONS PRESENTED**

1. Is a state prevented by the Sherman Act from requiring fair trade pricing for purely intrastate sales of alcoholic beverages by wholesale and retail licensees, particularly in view of the *Parker v. Brown* "state action" exemption?

2. Did Congress intend by repeal of the Miller-Tydings and McGuire Acts to have any effect on a state's right to



regulate wholesale and retail fair trade pricing practices of its intrastate alcoholic beverage licensees?

3. Aside from the *Parker v. Brown* "state action" exemption, does a state have a plenary right under the Twenty-first Amendment to require fair trade pricing practices for the purely intrastate sales of alcoholic beverages by wholesale and retail licensees?

### **STATUTES INVOLVED**

**California Constitution, Article XX, Section 22**

**California Business and Professions Code**

**Sections 24755, 24862, 24866**

(Because of the length of the text, these sections are printed in the Appendix to this brief.)

### **SUMMARY OF ARGUMENT**

Only one year ago, the California Supreme Court in *Rice v. Alcoholic Beverage Control Appeals Board (Rice)*, 21 Cal.3d 431 (1978), relying entirely on federal grounds, struck down longstanding state statutes requiring and regulating intrastate "fair trade" retail price maintenance practices for the sale of distilled spirits. The asserted ground of the Court's decision was that the statutes in question "... violate[d] the policy underlying the Sherman Act." (15 U.S.C. § 1 et seq.)

In four strongly worded prior decisions, the same Court had upheld the state's liquor fair trade laws. The reason for this abrupt turnabout was the indicated belief of the California Court that fair trade was an outmoded concept which was no longer in the public interest; that it had failed to achieve the legislative purposes of temperance

and orderly marketing conditions; and that fair trade laws generally were against public policy, not only in California, but throughout the United States. The decision was reached in spite of the fact that earlier the California Legislature had repealed all the state's fair trade laws except those relating to alcoholic beverages.

To buttress this judicial legislation, the California Supreme Court concluded that its prior decisions upholding the state's liquor fair trade retail price maintenance statutes were only justified because of the existence of the federal Miller-Tydings Act, which act excepted from the provisions of the Sherman Act minimum pricing contracts for certain commodities in interstate commerce, if lawful under state law, and the McGuire Act, which act permitted so-called "nonsigner contracts" binding all retailers to the minimum prices agreed to by any retailer contracting with a wholesaler. The Court held that with the repeal of those acts the justification for liquor fair trade laws had disappeared, leaving only the Sherman Act which now operated to prohibit the conduct permitted before repeal.

In *Rice*, the California Supreme Court discounted the language of the Senate Judiciary Committee's report on the repealing legislation and totally ignored the House Committee's report which expressly stated that by repeal of the Miller-Tydings and McGuire Acts Congress did not intend to "... impinge in some fashion upon the power of States to regulate liquor traffic under the second section of the Twenty-first Amendment ..." and that "[t]he repeal would terminate the power of liquor manufacturers to set resale prices under a general 'fair trade' statute, but would leave unimpaired whatever power the States have under the

Twenty-first Amendment to regulate the importation of liquor from outside the state." (H. Rep. No. 94-341, p. 3, fn. 2 (1975).)

Once reaching the erroneous conclusion that repeal of Miller-Tydings and McGuire required a reexamination of the law relating to liquor fair trade statutes, the California Supreme Court determined (1) that the *Parker v. Brown*, 317 U.S. 341 (1942) "state action" exemption doctrine was no longer viable; and (2) that the Sherman Act took precedence over a state's right to regulate purely intrastate liquor sales under the Twenty-first Amendment.

Each of these conclusions is incorrect.

For over 30 years, since the rendering of this Court's decision in *Parker v. Brown*, in 1942, no United States Supreme Court case which has in any way discussed the state action exemption has reached the result attained by the California Supreme Court in *Rice*. To the contrary, wherever action by a state has been directly challenged by a private party, the state action exemption has been applied to sustain the state's position. This is particularly evident in cases such as *Goldfarb*,<sup>1</sup> *Bates*,<sup>2</sup> and *New Motor Vehicle Board*.<sup>3</sup>

Similarly, when the Twenty-first Amendment is balanced against the Commerce Clause or other constitutional language, frequently, but not always, the states' powers under the Twenty-first Amendment must yield. It is fallacious, however, to compare the Sherman Act, a statute

<sup>1</sup>*Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

<sup>2</sup>*Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

<sup>3</sup>*New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 439 U.S. 96 (1978).

enacted under the Commerce Clause, with an express constitutional provision such as the Twenty-first Amendment. The Sherman Act is not paramount to the state's power to require its liquor licensees to comply with its fair trade statutes enacted under the Twenty-first Amendment.

In *Midcal Aluminum, Inc. v. Rice* (*Midcal*), 90 Cal.App. 3d 979 (1979), to which the instant Writ of Certiorari is directed, the Court of Appeal, an inferior California court, necessarily had no choice but to follow the California Supreme Court's *Rice* holding, setting aside the state's fair trade distilled spirits laws. Therefore, since the Court of Appeal could find no independent basis for distinguishing the state's wine fair trade pricing laws at either the wholesale or retail level, it was required to strike down those statutory provisions on the same theory. Because *Rice* was wrongly decided, the Court of Appeal's *Midcal* decision is equally so and must be reversed.

## STATEMENT OF THE CASE

### Background

Since 1932, the Constitution of California has provided that the state, "... subject to the internal revenue laws of the United States, shall have the exclusive right and power to license and regulate the manufacture, sale, purchase, possession and transportation of alcoholic beverages within the State, and subject to the laws of the United States regulating commerce between foreign nations and among the states shall have the exclusive right and power to regulate the importation into and exportation from the State, of alcoholic beverages."<sup>4</sup>

<sup>4</sup>California Constitution, article XX, section 22.

In that same part of the California Constitution, the Department of Alcoholic Beverage Control (Department) is given exclusive power, subject to language contained in the Constitution and statutes which may be enacted by the Legislature, to license the manufacture, importation and sale of alcoholic beverages in the state.

Pursuant to these constitutional provisions, the California Legislature enacted the Alcoholic Beverage Control Act.<sup>5</sup>

Section 24755<sup>6</sup> of that act requires that a manufacturer or brand owner file with the Department a minimum price schedule for distilled spirits which bears the brand name of the owner. The section also prohibits an offsale retail licensee from selling at less than the prescribed price.<sup>7</sup>

In *Rice v. Alcoholic Beverage Control Appeals Board* (*Rice*), 21 Cal.3d 431 (1978),<sup>8</sup> the California Supreme Court held that "... the price maintenance provisions embodied in section 24755 clearly violate the policy underlying the Sherman Act [15 U.S.C. § 1 et seq.]" (21 Cal.3d at p. 456.) The Court reached its conclusion through a balancing process of the Sherman Act's purpose in encouraging "... free and unfettered competition as the rule of

<sup>5</sup>Business and Professions Code section 23000 et seq.

<sup>6</sup>Business and Professions Code.

<sup>7</sup>Initially, California only permitted resale price maintenance by contract between a retailer and a wholesaler. (Stats. 1931, ch. 278, p. 583.) In 1933, a nonsigner provision was enacted. In 1961, Business and Professions Code section 24755 was amended to allow control of the price of liquor by means of the filing with the Department of a minimum retail price which had to be followed by all retailers.

<sup>8</sup>Printed in full in Appendix C to Petition for Certiorari herein.

trade ..."<sup>9</sup> against "... the Legislature's assumption that the price maintenance provisions would promote temperance and orderly marketing conditions. ..."<sup>10</sup> This balancing process led the court to find that the statute in question did not live up to the legislative aspirations;<sup>11</sup> that fair trade laws were no longer socially desirable but now contrary to public policy,<sup>12</sup> and "... that there are other means to achieve the fundamental goals of the price maintenance laws without running afoul of the Sherman Act."<sup>13</sup>

### The Instant Case

Following *Rice*, the Court of Appeal in *Midcal Aluminum, Inc. v. Rice*, (*Midcal*), *supra*, 90 Cal.App.3d 979, 983, summarized the relevant statutes before the Court as follows:

"Under [California] Business and Profession Code section 24862 no licensee may sell or resell to a retailer, and no retailer may buy any item of wine except at the selling or resale price contained in an effective price schedule or in an effective fair trade contract. No licensee is permitted to sell or resell to any consumer any item of wine at less than the selling or resale price

<sup>9</sup>*Rice, supra*, p. 453, quoting from *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 4-5 (1958).

<sup>10</sup>*Rice, supra*, p. 453.

<sup>11</sup>*Rice, supra*, page 458.

<sup>12</sup>*Rice, supra*, page 458.

<sup>13</sup>*Rice, supra*, page 459: "In sum, we find that the policies underlying the Sherman Act are clearly violated by the liquor price maintenance laws, and that on the other side of the balance there is doubt whether such laws promote temperance, there is a clear national trend against fair trade laws, and there exist means other than mandatory price fixing to achieve the ends which those laws seem to attain. We conclude, therefore, that the policies underlying the Sherman Act must prevail, and that the price maintenance provisions embodied in section 24755 are invalid."



contained in an effective price schedule or fair trade contract. Under section 24866 each grower, wholesaler, wine rectifier or rectifier must make and file fair trade contracts and/or file schedules of the resale prices of wines."

An accusation was filed against an alcoholic beverage license held by Midcal Aluminum, Inc. (Midcal) by the California Department of Alcoholic Beverage Control (Department) charging that Midcal sold to a licensed retailer 27 cases of wine at prices less than the selling prices contained in the effective price schedule filed with the Department by the E & J Gallo Winery. A second count charged that Midcal had sold to certain retailers wine for which there was no effective fair trade contract duly filed with the Department. Midcal stipulated to the truth of the facts set forth in the accusation.

The Department and Midcal entered into a further stipulation that subject to a judicial determination of the constitutionality of the statutory wine price posting and fair trade requirements, the Department could impose a monetary penalty or license suspension against Midcal as provided by statute.

Midcal then filed a petition for a writ of mandate in the California Court of Appeal, Third Appellate District, to review the exercise of the quasi-judicial power of a constitutionally authorized statewide agency, the Department.

The Court in due course released its decision, the subject of the instant Writ of Certiorari, ordering that a peremptory writ of mandate issue directing the Department to refrain from enforcing the wine fair trade and

price posting provisions of the California Alcoholic Beverage Control Act.

The Court's rationale was that the statutes and regulations relating to price maintenance of wine challenged in the proceeding bore "... no significant differences to the statutes and regulations relating to price maintenance of distilled spirits found to be invalid in *Rice v. Alcoholic Beverage Control Appeals Board*, *supra*, 21 Cal.3d 431", and that there is no independent basis for upholding the fair trade laws relating to wine. Because it is an inferior court to the California Supreme Court, the Court of Appeal was necessarily bound to follow the *Rice* decision.<sup>14</sup>

Both a petition for rehearing in the Court of Appeal and a petition for hearing in the California Supreme Court, brought by intervenor California Retail Liquor Dealers Association (CRLDA) (petitioner herein), were denied.

Although the instant petition necessarily seeks to overturn the Court of Appeal's *Midcal* decision concerning fair trade pricing statutes for wine, such reversal will also have the obvious consequence and effect upon the California Supreme Court holding in *Rice* which treated fair trade pricing of distilled spirits. Because *Rice* was so pivotal to a resolution of *Midcal*, this brief must necessarily be directed to the *Rice* decision.

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<sup>14</sup>*Midcal*, *supra*, 90 Cal.App.3d 979 at p. 984.

## ARGUMENT

### I

#### THE CALIFORNIA ALCOHOLIC BEVERAGE FAIR TRADE STATUTES ARE VALID UNDER THE PAR- KER V. BROWN EXEMPTION TO THE SHERMAN ACT

*Parker v. Brown*, *supra*, 317 U.S. 341, held that a state statute authorizing a state commission to administer an agricultural marketing program which purposively tended to restrict competition among state raisin growers was exempt from the proscriptions of the Sherman Act. The Court said:

"... We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

"The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state. The Act is applicable to 'persons' including corporations (§ 7), and it authorizes suits under it by persons and corporations (§ 15). A state may maintain a suit for damages under it, *Georgia v. Evans*, 316 U.S. 159, but the United States may not, *United States v. Cooper Corp.*, 312 U.S. 600—conclusions derived not from the literal meaning of the words 'person' and 'corporation' but from the purpose, the

subject matter, the context and the legislative history of the statute.

"There is no suggestion of a purpose to restrain state action in the Act's legislative history. The sponsor of the bill which was ultimately enacted as the Sherman Act declared that it prevented only 'business combinations.' 21 Cong.Rec. 2562, 2457; see also at 2459, 2461. That its purpose was to suppress combinations to restrain competition and attempts to monopolize by individuals and corporations, abundantly appears from its legislative history. [Citing cases.]

"...

"[I]n view of the latter's words and history, it must be taken to be a prohibition of individual and not state action." (*Parker, supra*, at pp. 350-352.)

*Parker v. Brown* was based partly on *Olsen v. Smith*, 195 U.S. 332, 344-345 (1904), and *Lowenstein v. Evans*, 69 F. 908, 910 (1895) (C.C.D.S.C.). In *Olsen*, one of the issues involved the question of whether Texas pilotage laws conflicted with the antitrust laws enacted by Congress. The Court upheld the Texas statutes stating that a judicial remedy would not lie to enjoin state conduct in those cases in which the state "... has plenary power until Congress has seen fit to act in the premises." (*Olsen, supra*, at p. 345.)

In any case such as the instant one wherein the federal antitrust laws must be tested against a state statute regulating intrastate alcoholic beverage sales, it is necessary to consider at least four different issues relating to the *Parker v. Brown*<sup>15</sup> "state action" exemption.

<sup>15</sup>*Parker v. Brown, supra*, 317 U.S. 341 (1942).

1. Is true "state action" involved?
2. Is such action within the *Parker v. Brown* exemption to the Sherman Act?
3. Is the statute being directly attacked by a private party charged with violation thereof?
4. Is the statute being attacked in an action for damages by or against a private party?

Here, true state action is involved; such state action is within the *Parker v. Brown* exemption to the Sherman Act; the statute is being directly attacked by a private party charged with its violation; and the statute is not being attacked in an action for damages by or against a private party.

#### A. True State Action is Involved in The Instant Case

The California Alcoholic Beverage Control Act involved herein, providing for fair trading of alcoholic beverages at wholesale and retail levels, is true state action.

In the instant case, statutes have been enacted pursuant to state constitutional mandate by a state legislature; certain conduct is demanded of state alcoholic beverage licensees; enforcement is by a state agency; and a licensee of the agency is contesting a disciplinary action for violation of said statutes. Every required element of state action is present within the confines of the facts of this case.

#### B. The State Action in The Instant Case Is Fully Within the *Parker v. Brown* Exemption To The Sherman Act

Of all the state action cases which have reached this Court, whether the *Parker v. Brown* exemption to the

Sherman Act issue is merely touched on<sup>16</sup> or deeply explored, not one has ever hinted at any softening of the doctrine where direct action by the state, such as in the instant case, is being challenged.<sup>17</sup> To the contrary, each succeeding case has resulted in stronger support of true state action.

In *Hitchcock v. Collenberg*, 140 F.Supp. 894 (D. Md. 1956), *aff'd per curiam*, 353 U.S. 919 (1957), the Court refused to accept the argument of a group of naturopaths that the Maryland State Medical Practice Act violated the antitrust laws. The Court by its affirmance approved the holding of the District Court that:

"[T]he complete answer to this contention is that the anti-trust laws deal with individual activity and not with state activity, *Parker v. Brown*, 317 U.S. 341, [citations omitted]; whereas all of the matters charged in the complaint as violative of the anti-trust laws are regulations prescribed by the Maryland legislature." (*Hitchcock, supra*, at p. 902.)

In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), the Court held that the publicity campaign of a group of railroads to obtain governmental action adverse to truckers was not illegal because it may have been affected by an anticompetitive purpose. The Court stated at pages 135-136:

<sup>16</sup>In *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 389 (1951), there is a passing reference to the caveat in *Parker v. Brown, supra*, 317 U.S. at pages 351, 353, that "... a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful."

<sup>17</sup>For comprehensive collections of United States Supreme Court and lower court cases, see student notes in 77 Colum. L.R. 898 (1977) and 29 *Hast.L.J.* 211 (1977).



"... It has been recognized, at least since the landmark decision of this Court in *Standard Oil Co. of New Jersey v. United States* that the Sherman Act forbids only those trade restraints and monopolizations that are created, or attempted, by the acts of 'individuals or combinations of individuals or corporations.' Accordingly, it has been held that where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out." (Footnote and citations omitted; last sentence citing to *Parker v. Brown*, *supra*, 317 U.S. 341.)

Five more recent cases have gone into the state action exemption in greater depth: *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975); *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978); *New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 439 U.S. 96 (1978).

The Court has set forth approximately 20 factors in these cases which may be utilized to determine in any given instance whether the *Parker v. Brown* state action exemption is applicable. Significantly, the instant case comports with each test. By every recognized standard the instant case is within the state action exemption.

*Goldfarb, supra*, advises that:

1. The state action must be "... required by the State acting as sovereign." (421 U.S. 773, at p. 790.)
2. The anticompetitive activities must be compelled by direction of the state acting as sovereign. (421 U.S. 773, at p. 791.)

3. The state cannot be joined with a private organization in the anticompetitive activity. (421 U.S. 773, at p. 792.)

4. The state must have a direct interest in the regulation and it must be necessary to achieve the state's purpose. (421 U.S. 773, at p. 792.)

5. The state should also probably have a great interest in regulating the activity. (421 U.S. 773, at p. 792.)

The action involved here, alcoholic beverage fair trade pricing practices, is a specific statutory requirement enacted under the direct aegis of the California Constitution; any anticompetitive effects of the pricing requirements are compelled by the language of the statutes; the state is not acting in concert with the licensee, but is directing the licensee's conduct; the state Constitution gives the Legislature the exclusive right to regulate the sale of alcoholic beverages in the state and has given the Director of the Department of Alcoholic Beverages the exclusive power to discipline licensees for conduct contrary to public welfare or morals; the constitutional language shows the great interest the state has in regulating the activity. Every *Goldfarb* test has been met.

*Cantor, supra*, adds these factors:

1. The ultimate responsibility for the anticompetitive activity should rest upon the state so that it is the real party in interest defendant. (428 U.S. 579, at p. 591.)
2. The private party under regulation cannot exercise sufficient freedom of choice to enable the Court to conclude that he should be held responsible for the consequences of his action. (428 U.S. 579, at p. 593.)

3. The private party cannot have any option to perform or not in accordance with the regulation. (428 U.S. 579, at p. 594.)

4. The state must have an independent regulatory interest in the subject matter of the regulation. (428 U.S. 579, at pp. 584-585.)

5. The regulation should be justified by circumstances such as flaws in the competitive market. (428 U.S. 579, at pp. 584-585.)

6. The regulation should implement some statewide policy relating to the subject matter of the regulation. (428 U.S. 579, at p. 585.)

7. Exemption from the Sherman Act must be essential to the state's regulation of the subject matter. (428 U.S. 579, at p. 597.)

8. The program cannot be instigated by the party regulated. (428 U.S. 579, at p. 591.)

Again, as in *Goldfarb*, each factor listed in *Cantor* is directly applicable to the instant case.

*Bates, supra*, derives from *Cantor* the alternative requirement to justification of an anticompetitive regulatory program that it should be in response to health or safety concerns. (433 U.S. 350, at p. 361.) It also adds new factors:

1. The challenged restraint should result from the affirmative command of the highest state authority. (433 U.S. 350, at pp. 360-361.)

2. The regulation must be at the core of the state's power to protect the public. (433 U.S. 350, at p. 361.)

3. The program cannot be instigated by the private party with only the acquiescence of the state's regulatory body (the action required must be mandatory). (433 U.S. 350, at p. 362.)

4. The regulation should reflect a clear articulation of the state's policy with regard to the required behavior. (433 U.S. 350, at p. 362.)

5. The state should be actively supervising the program. (433 U.S. 350, at p. 362.)

The *Goldfarb* tests are met here; the *Cantor* tests are met; and the *Bates* test are met. Every factor is totally satisfied in the circumstances of the instant case.

*Lafayette, supra*, concludes that local governments such as cities are not covered by the *Parker v. Brown* state action exemption.

And *New Motor Vehicle Board, supra*, holds that even if a state scheme gives effect to privately initiated restraints on trade, it is still valid under the *Parker v. Brown* state action exemption.

In *New Motor Vehicle Board, supra*, 439 U.S. 96 the Court said at page 109:

"Appellees next contend that the Automobile Franchise Act conflicts with the Sherman Act, 15 U.S.C. § 1 *et seq.* [Footnote omitted.] They argue that by delaying the establishment of automobile dealerships whenever competing dealers protest, the state scheme gives effect to privately initiated restraints on trade, and

thus is invalid under *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951).

"The dispositive answer is that the Automobile Franchise Act's regulatory scheme is a system of regulation, clearly articulated and affirmatively expressed, designed to displace unfettered business freedom in the matter of the establishment and relocation of automobile dealerships. The regulation is therefore outside the reach of the antitrust laws under the 'state action' exemption. *Parker v. Brown*, 317 U.S. 341 (1943); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). See also *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978).

"....

"Appellee's reliance upon *Schwegmann Bros. v. Calvert Distillers Corp.*, *supra*, is misplaced. In *Schwegmann*, the State attempted to authorize and immunize private conduct violative of the antitrust laws. California has not done that here. Protesting dealers who invoke in good faith their statutory right to governmental action in the form of a Board determination that there is good cause for not permitting a proposed dealership do not violate the Sherman Act, *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965). [Footnote omitted.]

"Appellees also argue conflict with the Sherman Act because the Automobile Franchise Act permits auto dealers to invoke state power for the purpose of restraining intrabrand competition. 'This is merely another way of stating that the . . . statute will have an anticompetitive effect. In this sense, there is a conflict between the statute and the central policy of the

Sherman Act—"our charter of economic liberty." Nevertheless, this sort of conflict cannot itself constitute a sufficient reason for invalidating the . . . statute. For if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed.' *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 133 (1978)." (*New Motor Vehicle Board, supra*, 439 U.S. 96, at pp. 109-111.)

In the instant case, a state regulated alcoholic beverage licensee is attempting to overturn a state statute expressly requiring certain conduct (fair trade practices) which, except for the *Parker v. Brown* state action doctrine, might otherwise be in violation of the Sherman Act's antitrust proscriptions.

Mere reference to the foregoing criteria enunciated in *Parker v. Brown* and its progeny leads to the ineluctible conclusion that a proper state action exemption exists here. The California Constitution and the relevant alcoholic beverage statutes enacted thereunder are unequivocal. By them the state, through the Department of Alcoholic Beverage Control, imposes a restraint on the alcoholic beverage licensee as an act of government. The activity which is regulated, the pricing of alcoholic beverages at wholesale and retail levels, is required and compelled by the state acting as sovereign. The state is not party to any contract or agreement and has entered into no conspiracy in restraint of trade or to establish monopoly, but as sovereign has enforced the restraint (alcoholic beverage fair trade regulations) as an act of government which the Sherman Act did not undertake to prohibit. The state has a direct interest in the regulated activity and it is necessary to



achieve the state's purposes of regulating commerce in alcoholic beverages and protection of public welfare and morals. The licensee regulated has no control over the statutory requirement and has no option whether or not to comply with the law. The regulation is at the core of the state's power to protect the public. The state actively supervises and enforces the program.

**C. The Matter Here Regulated, Alcoholic Beverage Fair Trade Laws, is Relevant to the Question of Relationship of the Parties to this Lawsuit**

Of significance here is the nature of the judicial proceedings which have brought this case and, indirectly, *Rice*, *supra*, before the Court.

State licensed alcoholic beverage dealers charged with fair trade violations of the California Alcoholic Beverage Control Act seek to set aside resultant disciplinary penalties on the ground that the regulatory statutes violate the Sherman Act.

*Cantor*, *supra*, and *Bates*, *supra*, clearly stand for the proposition that the Sherman Act may not be validly pleaded as a defense by these private litigants in this case. In *Bates*, the Court said:

"We believe, however, that the context in which *Cantor* arose is critical. First, and most obviously, *Cantor* would have been an entirely different case if the claim had been directed against a public official or public agency, rather than against a private party.<sup>13</sup> Here, the appellants' claims are against the State. The

<sup>13</sup> MR. JUSTICE STEVENS, in a portion of his opinion in *Cantor* that was joined by BRENNAN, WHITE and MARSHALL, J.J., observed that *Parker v. Brown* was a suit against

Arizona Supreme Court is the real party in interest; it adopted the rules, and it is the ultimate trier of fact and law in the enforcement process. *In re Wilson*, 106 Ariz. 34, 470 P.2d 441 (1970). Although the State Bar plays a part in the enforcement of the rules, its role is completely defined by the court; the appellee acts as the agent of the court under its continuous supervision." (*Bates v. Arizona*, *supra*, 433 U.S. 350, at p. 361.)

The question of the relationship of the parties to a lawsuit was expressed in a different way by the California Supreme Court in two of the four cases<sup>18</sup> prior to *Rice*, where it had upheld the constitutionality of the state's alcoholic beverage fair trade statutes.

In *Samson Market*, 71 Cal.2d 1215 at pp. 1219-1220, the Court said, quoting from *Wilke & Holzheiser*:

"... The power we analyze here finds expression in the private act of the producer in entering into a contract setting a price for the resale of his own brand. . . . To argue that the Alcoholic Beverage Control Act unlawfully delegates legislative power because it is a 'price-fixing act' is to overlook the crucial distinction between the fixing of a price for all products in a given market and the setting by the producer of the retail price at which his own product is to be

public officials, whereas in *Cantor* the claims were directed against only a private defendant. 428 U.S., at 585-592, 600-601. The dissenters in *Cantor* would have applied the state-action exemption regardless of the identity of the defendants. (*d.* at 615-617. STEWART, J., joined by POWELL and REHNQUIST, J.J.)."

<sup>18</sup> *Allied Properties v. Department of Alcoholic Beverage Control*, 53 Cal.2d 141 (1959); *Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control*, 65 Cal.2d 349 (1966); *Samson Market Co. v. Alcoholic Beverage Control Appeals Board*, 71 Cal.2d 1215 (1969); *Big Boy Liquors Ltd. v. Alcoholic Beverage Control Appeals Board*, 71 Cal.2d 1226 (1969).

*sold.* (Original italics.) (*Id.* at pp. 365-366.) “(Emphasis added.)

Because the state is here requiring a licensee to comply with its alcoholic beverage pricing requirements by stating the price at which its products should be sold, a protected act under the *Parker v. Brown* state action exemption, the licensee cannot validly urge the Sherman Act as a defense to an administrative disciplinary action.

## II

### REPEAL OF THE MILLER-TYDINGS AND McGUIRE ACTS DID NOT AFFECT THE VALIDITY OF STATE FAIR TRADE LAWS RELATING TO ALCOHOLIC BEVERAGES

In *Rice v. Alcoholic Beverage Control Appeals Board*, 21 Cal.3d 431, 456 et seq. (1978), progenitor of *Midcal Aluminum, Inc. v. Rice*, 90 Cal.App.3d 979 (1979), to which the instant writ of certiorari is directed, the California Supreme Court concluded that the repeal of the Miller-Tydings Act<sup>19</sup> which excepted from the provisions of the Sherman Act minimum pricing contracts for commodities in interstate commerce if lawful under state law, and the McGuire Act<sup>20</sup> which permitted so called “nonsigner contracts” binding all retailers to the minimum prices agreed to by any retailer contracting with a wholesaler, by the Consumer Goods Pricing Act of 1975<sup>21</sup> made the Sherman Act directly apply to California’s alcoholic beverage pricing requirements and that those requirements were now

invalid “state action” in the alcoholic beverage pricing regulation area.

In four previous cases, the California Supreme Court upheld the California alcoholic beverage price regulation statutes at both the wholesale and retail levels.<sup>22</sup>

By the time the California Supreme Court issued its decision in *Rice*, *supra*, however, it had concluded that the fair trade concept was no longer socially desirable. Finding itself shackled with its own strongly worded opinions upholding fair trade in these four cases, it had to find some escape hatch to justify a total change in position. Hence, it developed the repeal of Miller-Tydings and McGuire theory.

Significantly, the California Court never really showed that these two acts were ever applicable; rather, the court rationalized that their repeal per se indicated fair trade was an outmoded concept, and since alcoholic beverages was the last fair trade category left in California, it too should go. (*Rice*, *supra*, 21 Cal.3d 431, 447-450.)

To reach this result, the California Supreme Court discounted the report of the Senate Judiciary Committee<sup>23</sup> recommending repeal of *Miller-Tydings* and *McGuire* which expressly stated that repeal of these acts would not affect intrastate regulation of liquor. The Court referred to the following language in the Senate Report:

“... Liquor will not be affected by repeal of the fair trade laws in the same manner as other products because the Twenty-first Amendment to the Constitution

<sup>19</sup>50 Stat. 693 (1937).

<sup>20</sup>66 Stat. 631 (1952).

<sup>21</sup>89 Stat. 801 (1975).

<sup>22</sup>See footnote 18 herein.

<sup>23</sup>S. Rep. No. 94-466 (1975).

gives the States broad powers over the sale of alcoholic beverages. Thus while repeal of the fair trade laws generally will prohibit manufacturers from enforcing resale prices, alcohol manufacturers may do such in States which pass price fixing statutes pursuant to the Twenty-first Amendment. (1975 U.S. Code, Cong. & Admin. News, at pp. 1569, 1571.)<sup>24</sup>

(*Rice, supra*, 21 Cal.3d at pp. 445-446; fn. 8.)<sup>25</sup>

Commenting on this excerpt, the California Supreme Court stated in *Rice, supra*, at pp. 445-446:

"... This statement in the report represents only an opinion that the Twenty-first Amendment will allow continuation of price fixing for liquor in those states which properly allow such conduct. . . . We do not view this opinion as a declaration of antitrust policy. There is a 'heavy presumption against implicit exemptions' to the Sherman Act (*Goldfarb, supra*, 421 U.S. 773, at p. 787 [citations omitted]), and we conclude that the statement in the Senate report relied upon by the department does not allow us to read into the Sherman Act an exemption for liquor fair trade provisions which the act itself does not contain."

The Court's disclaimer ignored another and even more specific report filed by the House of Representatives relative to the same statutes. The House document reads in pertinent part:

"2. Some concern was expressed in hearings before the subcommittee that the repeal of Miller-Tydings and McGuire might impinge in some fashion upon the power of States to regulate liquor traffic under the

<sup>24</sup>S. Rep. No. 94-466, page 2 (1975).

<sup>25</sup>Another reference was made to the Senate report in *Rice, supra*, at page 456, footnote 21. This reference related to the economic effects of presence or absence of fair trade.

second section of the 21st amendment. *No such effect is intended. The repeal would terminate the power of liquor manufacturers to set resale prices under a general 'fair trade' statute, but would leave unimpaired whatever power the States have under the 21st amendment to regulate the importation of liquor from outside the State.*" (Emphasis added.) (Report of the House Committee on the Judiciary on the Consumer Goods Pricing Act of 1975, 94th Congress, 1st Session, Report No. 94-341, July 9, 1975, page 3, footnote 2.)

The importance of the House Report increases greatly when it is noted that the Senate and House reports were both referring to identical bills, Senate Bill S-408 and House Bill H.R. 6971. In fact, the Senate Judiciary Committee actually substituted H.R. 6971 for S. 408 when it was sent to the floor of the Senate for passage.<sup>26</sup>

Senate and House Committee reports "... may be regarded as an exposition of the legislative intent in a case where otherwise the meaning of the statute is obscure." (*Duplex Printing Press Company v. Deering*, 254 U.S. 433, 474 (1921)).

Had the California Supreme Court, in *Rice*, considered the reports of both houses of Congress it would have had extreme difficulty in justifying its premise that the repeal of Miller-Tydings and McGuire Acts meant state alcoholic beverage fair trade laws were no longer viable. That premise failing, the entire opinion of the California Supreme Court in *Rice* necessarily falls for lack of substance.

<sup>26</sup>121 Cong. Rec. 38049 (1975) (remarks of Sen. Brooke).



## III

**THE TWENTY-FIRST AMENDMENT MUST BE BALANCED AGAINST THE COMMERCE CLAUSE ITSELF, NOT AGAINST STATUTES SUCH AS THE SHERMAN ACT WHICH ARE ENACTED UNDER THE COMMERCE CLAUSE**

It is axiomatic that constitutional interpretation requires that each part of the Constitution necessarily has the same dignity as any other part. (*Richardson v. Ramirez*, 418 U.S. 24, 25 (1974).) Or, more succinctly:

“As no constitutional guarantee enjoys preference, so none should suffer subordination or deletion.” (*Ullman v. United States*, 350 U.S. 422, 428 (1956).)

In *Dick v. United States*, 208 U.S. 340 (1908), this Court balanced the right of a state to have “. . . full complete jurisdiction over all persons and things within its limits, except as it may be restrained by the provisions of the federal Constitution or by its own constitution” against the expressed constitutional congressional power to regulate commerce with Indian tribes. In the instant case the Court should similarly balance the state’s right to control its intrastate alcoholic beverage trade under the Twenty-first Amendment with the congressional right to regulate interstate commerce.

Where it is necessary to compare and to weigh different provisions of the Constitution, the Court should do so without nullifying or substantially impairing one or the other. (*Dick*, *supra*, at p. 353.)

Mr. Justice Frankfurter’s Concurring Opinion in *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 282 (1945)

puts the instant controversy between the Twenty-first Amendment and the Sherman Act in its proper perspective.

“As a matter of constitutional law, the result of the Twenty-first Amendment is that a State may erect any barrier it pleases to the entry of intoxicating liquors. Its barrier may be low, high, or insurmountable. Of course, if a State chooses not to exercise the power given it by the Twenty-first Amendment and to continue to treat intoxicating liquors like other articles, the operation of the Commerce Clause continues. Since the Commerce Clause is subordinate to the exercise of state power under the Twenty-first Amendment, the Sherman Law, deriving its authority from the Commerce Clause, can have no greater potency than the Commerce Clause itself. It must equally yield to state power drawn from the Twenty-first Amendment. And so, the validity of a charge under the Sherman Law relating to intoxicating liquors depends upon the utilization by a State of its constitutional power under the Twenty-first Amendment. If a State for its own sufficient reasons deems it a desirable policy to standardize the price of liquor within its borders either by a direct price-fixing or by permissive sanction of such price-fixing in order to discourage the temptations of cheap liquor due to cut-throat competition, the Twenty-first Amendment gives it that power and the Commerce Clause does not gain-say it. Such state policy can not offend the Sherman Law even though distillers or middlemen agree with local dealers to respect this policy. If an agreement among local dealers not to buy liquor through channels of interstate commerce does not offend the Sherman Law though a like agreement as to other com-

modities would, an agreement among liquor dealers to abide by state policy for a uniform price—which is far less restrictive of interstate commerce than a comprehensive boycott—can hardly be a violation of Sherman Law.” (Pp. 300-301.)

Thus, in *Seagram and Sons v. Hostetter*, 384 U.S. 35, 42 (1966), the Court started with the proposition that where the “. . . case concerns liquor destined for use, distribution, or consumption in the State . . . the Twenty-first Amendment demands wide latitude for regulation by the State.” In this context, the Court tested the New York liquor price affirmation statute against the Commerce Clause, finding no undue burden; against the Supremacy Clause, finding no clear conflict between state and federal law; against an argument that the state statute was void for vagueness; and against the Equal Protection Clause, finding no invidious discrimination. The Court also upheld the statute under the Due Process Clause of the Fourteenth Amendment, first emphasizing the principle that such clause should not be used to strike down laws which may be considered by courts rather than state legislatures to be socially undesirable, and second, that in any event the New York law was not unreasonable.

In *Hostetter v. Idlewild Liquor Corp.*, 377 U.S. 324 (1964), the comparison of the Twenty-first Amendment against the express constitutional authority given to Congress to regulate commerce with foreign nations led to the holding that New York could not tax sales of liquor destined directly for foreign commerce. (377 U.S. 324 at p. 334.) There the Court set forth the extent of the relation-

ship of the Twenty-first Amendment to other parts of the Constitution:

“This Court made clear in the early years following adoption of the Twenty-first Amendment that by virtue of its provisions a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders. Thus, in upholding a State’s power to impose a license fee upon importers of beer, the Court pointed out that ‘[p]rior to the Twenty-first Amendment it would obviously have been unconstitutional to have imposed any fee for that privilege. The imposition would have been void, . . . because the fee would be a direct burden on interstate commerce; and the commerce clause confers the right to import merchandise free into any state, except as Congress may otherwise provide.’ (*State Board v. Young’s Market Co.*, 299 U.S. 59, 62.) In the same vein, the Court upheld a Michigan statute prohibiting Michigan dealers from selling beer manufactured in a State which discriminated against Michigan beer. *Brewing Co. v. Liquor Comm’n*, 305 U.S. 391. ‘Since the Twenty-first Amendment, . . . the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause. . . .’ *Id.*, at 394. See also *Finch & Co. v. McKittrick*, 305 U.S. 395.

“This view of the scope of the Twenty-first Amendment with respect to a State’s power to restrict, regulate, or prevent the traffic and distribution of intoxicants within its borders has remained unquestioned.

“ . . . .

“To draw a conclusion from this line of decisions that the Twenty-first Amendment has somehow oper-

ated to repeal the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd over-simplification. If the Commerce Clause had been *pro tanto* 'repealed', then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor. Such a conclusion would be patently bizarre and is demonstrably incorrect.

" . . . . .

"Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in light of the other, and in the context of the issues and interests at stake in any concrete case." (*Hostetter v. Idlewild Liquor Corp.*, *supra*, 377 U.S. 324 at pp. 330-332.)<sup>27</sup>

An additional example where one part of the Constitution is balanced against another in Twenty-first Amendment cases is *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) where a state requirement that the names of known excessive drinkers had to be posted in retail liquor outlets gave way to the Due Process Clause of the Fourteenth Amendment.

*Craig v. Boren*, 429 U.S. 190 (1976), which involved different drinking ages for men and women in Oklahoma, primarily concerned the Twenty-first Amendment as it related to the Equal Protection Clause. There, the Court discussed

<sup>27</sup>See also, *National Railroad Passenger Corporation v. Miller*, 358 F.Supp. 1321 (D. Kan. 1973) *affd.* on app. 414 U.S. 948 (1973) and *National Railroad Passenger Corporation v. Harris*, 490 F.2d 572 (10th Cir. 1974), disregarded as authority by the California Supreme Court in *Rice v. Alcoholic Beverage Control Appeals Board*, *supra*, 21 Cal.3d 431, 450, fn. 11.

the question of the "strength" of one part of the Constitution over another. Citing *California v. La Rue*, 409 U.S. 109 (1972), the Court stated:

" . . . the Court has never recognized sufficient 'strength' in the [Twenty-first] Amendment to defeat an otherwise established claim of invidious discrimination in violation of the Equal Protection Clause." (*Craig, supra*, at p. 207.)

*La Rue, supra*, involved the balancing of Twenty-first and First Amendment rights in the context of alcoholic beverage regulations governing nudity and films in licensed premises. The argument that entertainment as a means of artistic expression should always be protected under the First and Fourteenth Amendments gave way to the Twenty-first Amendment right of the states to regulate the manner and conditions under which alcoholic beverages are dispensed by state licensees. *La Rue* considered the state regulations ". . . in a context of licensing bars and nightclubs to sell liquor by the drink . . ." rather than in the context of a dramatic theatrical performance. (*La Rue, supra*, 409 U.S. 109 at p. 114.)

There the Court said:

"While the States, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power, the broad scope of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare and morals. In *Hostetter v. Idlewild Liquor Corp.*, 377 U.S. 324, 330 (1964), the Court reaffirmed that by reason of the Twenty-first Amend-



ment 'a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders.' Still earlier, the Court stated in *State Board v. Young's Market Co.*, 299 U.S. 59, 64 (1936):

"A classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth.

"These decisions do not go so far as to hold or say that the Twenty-first Amendment supersedes all other provisions of the United States Constitution in the area of liquor regulations. . . . But the case for upholding state regulation in the area covered by the Twenty-first amendment is undoubtedly strengthened by that enactment. . . ." (*California v. La Rue*, *supra*, 409 U.S. 109 at pp. 114-115.)

Another indication that even "Bill of Rights" protections may occasionally give way to a state's power to regulate its business licensees is found in *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978). There the Court, though declaring invalid broad enforcement activities of agents of the Secretary of Labor to search the work area of any employment facility within the jurisdiction of the Occupational Safety and Health Act, nevertheless recognized that there might still even be exceptions to the Fourth Amendment's protections in the case of longtime and closely regulated industries. At page 313, the Court said:

"The Secretary urges that an exception from the search warrant requirement has been recognized for 'pervasively regulated business[es]' *United States v. Biswell*, 406 U.S. 311, 316 (1972), and for 'closely regulated' industries 'long subject to close supervision

and inspection.' *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 74, 77 (1970). These cases are indeed exceptions, but they represent responses to relatively unique circumstances. Certain industries have such a history of government oversight that no reasonable expectation of privacy, see *Katz v. United States*, 389 U.S. 347, 351-352 (1967), could exist for a proprietor over the stock of such an enterprise. Liquor (*Colonnade*) and firearms (*Biswell*) are industries of this type; when an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulation.

"Industries such as these fall within the 'certain carefully defined classes of cases,' referenced in *Camara*, *supra*, at 528. The element that distinguishes these enterprises from ordinary businesses is a long tradition of close government supervision, of which any person who chooses to enter such a business must already be aware. 'A central difference between those cases [*Colonnade* and *Biswell*] and this one is that businessmen engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade, whereas the petitioner here was **not** engaged in any regulated or licensed business. The businessman in a regulated industry in effect consents to the restrictions placed upon him.' *Almeida-Sanchez v. United States*, 413 U.S. 266, 271 (1973)."

In the foregoing illustrations, when the Twenty-first Amendment was compared to other parts of the Constitution, language of equal but mutual import was balanced. If one clause appeared to exclude another, or if the two were totally irreconcilable, the relevant or dominant one which had a "stronger" impact was preferred. In none of these cases, however, was any statutory language ever

deemed paramount to the constitutional phraseology with its concomitant powers.

If the Twenty-first Amendment is to be compared to the Sherman Act, it would only be possible to do so if some direct Commerce Clause question was presented.

In the instant case, there are no problems of due process, equal protection, freedom of expression, interstate commerce, foreign commerce, or Indian commerce. Here, the Court is presented with a purely intrastate issue with no such constitutional implications. Under such circumstances, the state's right to control its alcoholic beverage trade under the Twenty-first Amendment must prevail over any defense that the Sherman Act is applicable.

### CONCLUSION

From the foregoing, it is readily discernible that the California Supreme Court grossly erred in its analysis in *Rice v. Alcoholic Beverage Control Appeals Board*, *supra*, 21 Cal.3d 431 (1978) when it declared California's distilled spirits fair trade pricing statutes invalid on the ground they were incompatible with the policy underlying the Sherman Act.

In its zeal to eliminate fair trade, contrary to the expressed wishes of the California Legislature, the Court turned away from the solid legal analysis in four of its own prior cases upholding California alcoholic beverage wholesale and retail price maintenance practices and substituted in lieu thereof a conclusion totally contrary to clearly enunciated pronouncements by the Supreme Court of the United States.

Starting with the sociological premise that fair trade in any form is an anathema, the California Supreme Court looked for a magic talisman to utilize in combating the evil it felt still existed in the state. The decision was reached in the face of the California Legislature's determination that although other fair trade laws had been repealed, alcoholic beverage fair trade statutes should remain in effect.

Congressional repeal of the Miller-Tydings and McGuire Acts had only recently occurred when *Rice* was decided. And even though both the Senate and House committee reports clearly demonstrated a specific congressional intent that the repeal of these statutes would have no diminishing effect on the power of the states to regulate intrastate alcoholic beverage traffic under the Twenty-first Amendment, the California Supreme Court chose not to follow that admonition.

Instead, it proceeded to reevaluate its former legal position and reexamined both the *Parker v. Brown* "state action" exemption to the Sherman Act, concluding that it was no longer applicable. Examining the cases interpreting state powers under the Twenty-first Amendment, the Court concluded that state power to control intrastate alcoholic beverage pricing practices no longer had any viability.

The California Supreme Court erred completely in all three premises. Repeal of the Miller-Tydings and McGuire Acts had no effect on the state's rights to control intrastate alcoholic beverage prices; the *Parker v. Brown* state action exemption to the Sherman Act exists even stronger than ever before; and the other constitutional limitations

which may curtail a state's Twenty-first Amendment powers still leave fully intact the state's power to control the manner and method of alcoholic beverage pricing by its licensees within the state.

Of course, *Rice v. Alcoholic Beverage Control Appeals Board* is long since final. The decision of this Court herein will not directly affect the parties to that case. But *Midcal Aluminum, Inc. v. Rice*, the case to which the instant Writ of Certiorari has been directed by this Court, is based totally and completely on *Rice v. Alcoholic Beverage Control Appeals Board*, which, as discussed above, cannot be supported in logic or in law. For these reasons, the decision of the Court of Appeal in *Midcal* must be reversed.

Respectfully submitted,

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(Appendix A follows)

## APPENDIX A



## **STATUTES INVOLVED**

### **California Constitution, Article XX, Section 22**

SEC. 22. The State of California, subject to the internal revenue laws of the United States, shall have the exclusive right and power to license and regulate the manufacture, sale, purchase, possession and transportation of alcoholic beverages within the State, and subject to the laws of the United States regulating commerce between foreign nations and among the states shall have the exclusive right and power to regulate the importation into and exportation from the State, of alcoholic beverages. In the exercise of these rights and powers, the Legislature shall not constitute the State or any agency thereof a manufacturer or seller of alcoholic beverages.

All alcoholic beverages may be bought, sold, served, consumed and otherwise disposed of in premises which shall be licensed as provided by the Legislature. In providing for the licensing of premises, the Legislature may provide for the issuance of, among other licenses, licenses for the following types of premises where the alcoholic beverages specified in the licenses may be sold and served for consumption upon the premises:

(a) For bona fide public eating places, as defined by the Legislature.

(b) For public premises in which food shall not be sold or served as in a bona fide public eating place, but upon which premises the Legislature may permit the sale or service of food products incidental to the sale and service of alcoholic beverages. No person under the age of 21 years

shall be permitted to enter and remain in any such premises without lawful business therein.

(c) For public premises for the sale and service of beers alone.

(d) Under such conditions as the Legislature may impose, for railroad dining or club cars, passenger ships, common carriers by air, and bona fide clubs after such clubs have been lawfully operated for not less than one year.

The sale, furnishing, giving, or causing to be sold, furnished, or giving away of any alcoholic beverage to any person under the age of 21 years is hereby prohibited, and no person shall sell, furnish, give, or cause to be sold, furnished, or given away any alcoholic beverage to any person under the age of 21 years, and no person under the age of 21 years shall purchase any alcoholic beverage.

The Director of Alcoholic Beverage Control shall be the head of the Department of Alcoholic Beverage Control, shall be appointed by the Governor subject to confirmation by a majority vote of all of the members elected to the Senate, and shall serve at the pleasure of the Governor. The director may be removed from office by the Governor, and the Legislature shall have the power, by a majority vote of all members elected to each house, to remove the director from office for dereliction of duty or corruption or incompetency. The director may appoint three persons who shall be exempt from civil service, in addition to the person he is authorized to appoint by Section 4 of Article XXIV.

The Department of Alcoholic Beverage Control shall have the exclusive power, except as herein provided and in

accordance with laws enacted by the Legislature, to license the manufacture, importation and sale of alcoholic beverages in this State, and to collect license fees or occupation taxes on account thereof. The department shall have the power, in its discretion, to deny, suspend or revoke any specific alcoholic beverages license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals, or that a person seeking or holding a license has violated any law prohibiting conduct involving moral turpitude. It shall be unlawful for any person other than a licensee of said department to manufacture, import or sell alcoholic beverages in this State.

The Alcoholic Beverage Control Appeals Board shall consist of three members appointed by the Governor, subject to confirmation by a majority vote of all of the members elected to the Senate. Each member, at the time of his initial appointment, shall be a resident of a different county from the one in which either of the other members resides. The members of the board may be removed from office by the Governor, and the Legislature shall have the power, by a majority vote of all members elected to each house, to remove any member from office for dereliction of duty or corruption or incompetency.

When any person aggrieved thereby appeals from a decision of the department ordering any penalty assessment, issuing, denying, transferring, suspending or revoking any license for the manufacture, importation, or sale of alcoholic beverages, the board shall review the decision subject to such limitations as may be imposed by the Legislature.

In such cases, the board shall not receive evidence in addition to that considered by the department. Review by the board of a decision of the department shall be limited to the questions whether the department has proceeded without or in excess of its jurisdiction, whether the department has proceeded in the manner required by law, whether the decision is supported by the findings, and whether the findings are supported by substantial evidence in the light of the whole record. In appeals where the board finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the department it may enter an order remanding the matter to the department for reconsideration in the light of such evidence. In all other appeals the board shall enter an order either affirming or reversing the decision of the department. When the order reverses the decision of the department, the board may direct the reconsideration of the matter in the light of its order and may direct the department to take such further action as is specially enjoined upon it by law, but the order shall not limit or control in any way the discretion vested by law in the department. Orders of the board shall be subject to judicial review upon petition of the director or any party aggrieved by such order.

A concurrent resolution for the removal of either the director or any member of the board may be introduced in the Legislature only if five Members of the Senate, or 10 Members of the Assembly, join as authors.

Until the Legislature shall otherwise provide, the privilege of keeping, buying, selling, serving, and otherwise disposing of alcoholic beverages in bona fide hotels, res-

taurants, cafes, cafeterias, railroad dining or club cars, passenger ships, and other public eating places, and in bona fide clubs after such clubs have been lawfully operated for not less than one year, and the privilege of keeping, buying, selling, serving, and otherwise disposing of beers on any premises open to the general public shall be licensed and regulated under the applicable provisions of the Alcoholic Beverage Control Act, insofar as the same are not inconsistent with the provisions hereof, and excepting that the license fee to be charged bona fide hotels, restaurants, cafes, cafeterias, railroad dining or club cars, passenger ships, and other public eating places, and any bona fide clubs after such clubs have been lawfully operated for not less than one year, for the privilege of keeping, buying, selling, or otherwise disposing of alcoholic beverages, shall be the amounts prescribed as of the operative date hereof, subject to the power of the Legislature to change such fees.

The State Board of Equalization shall assess and collect such excise taxes as are or may be imposed by the Legislature on account of the manufacture, importation and sale of alcoholic beverages in this State.

The Legislature may authorize, subject to reasonable restrictions, the sale in retail stores of alcoholic beverages contained in the original packages, where such alcoholic beverages are not to be consumed on the premises where sold; and may provide for the issuance of all types of licenses necessary to carry on the activities referred to in the first paragraph of this section, including, but not limited to, licenses necessary for the manufacture, production, processing, importation, exportation, transportation,



wholesaling, distribution, and sale of any and all kinds of alcoholic beverages.

The Legislature shall provide for apportioning the amounts collected for license fees or occupation taxes under the provisions hereof between the State and the cities, counties and cities and counties of the State, in such manner as the Legislature may deem proper.

All constitutional provisions and laws inconsistent with the provisions hereof are hereby repealed.

The provisions of this section shall be self-executing, but nothing herein shall prohibit the Legislature from enacting laws implementing and not inconsistent with such provisions.

This amendment shall become operative on January 1, 1957.

**California Business and Professions Code Section 24755**

**§ 24755.**

(a) No package of distilled spirits which bears the brand, trademark or name of the owner or person in control shall be sold at retail in this State for consumption off the license premises unless a minimum retail price for such package first shall have been filed with the department in accordance with the provisions of this section.

(b) A price for each of such packages shall be in a minimum retail price schedule setting forth with respect to each package the exact brand, trademark or name, capacity, and type of package, type of distilled spirits, age and proof, where stated on the label, and the minimum selling price at retail. The price for any such package may

be filed separately and differently for the trading area of southern California and the trading area of northern California. The trading area of southern California shall consist of the Counties of Santa Barbara, Ventura, Los Angeles, Orange, Riverside, San Bernardino, Imperial and San Diego. The northern California trading area shall consist of the other counties of the state. No more than one person shall file a schedule for the same package for the same trading area.

(c) Such schedule shall be filed by (1) the owner of the brand, if licensed in the State; (2) any licensee, other than a retailer, selling the brand and who is authorized in writing by the brand owner to file such schedule if the brand owner is not licensed in this State; (3) a manufacturer or rectifier licensed in this State and who bottles under the brand owned by a retailer; or (4) any licensee with the approval of the department, if the owner of the brand does not file or is unable to file a schedule or authorize a licensee other than a retailer to file such schedule.

(d) Schedules filed pursuant to this section may be amended, changed, or modified by filing such amendments, change, or modification with the department on or before the 15th day of any month to take effect on the first day of the second succeeding calendar month; except that prices filed for a brand, size, or type not included in a schedule in effect at the time such brand, size, or type is filed, and prices filed to meet the price of a competitive brand, may be filed on or before the 15th day of any month to take effect on the first day of the following month. For the purpose of this section, a competitive brand shall mean any brand of the same type of distilled spirits having a filed

selling price at retail within one dollar (\$1) per gallon of the brand for which a competitive price is filed.

The department shall reject any price schedule which does not comply with this subdivision.

(e) A price schedule or amendment, change or modification thereof as provided for by this section shall be deemed filed when received, either by personal delivery or mail, at the headquarters office of the department in Sacramento. Upon such filing, a price schedule or amendment, change or modification thereof shall become a public record. Such filing of a price schedule or amendment, change or modification thereof shall constitute constructive notice of its contents to any licensee affected thereby.

(f) No off-sale licensee shall sell any package of distilled spirits at any price less than the effective filed price of such package unless written permission is granted by the department, for good cause shown and for reasons not inconsistent with this division.

(g) No retail licensee shall sell any package of distilled spirits as a loss leader. "Loss leader," as used in this section, means a sale below cost as such cost is defined in Sections 17026 to 17029, inclusive, of this code, except that a sale below cost made under the provisions of Section 17050 of this code shall not be deemed a loss leader sale.

(h) The provisions of this section shall not apply to:

- (1) A closeout sale made in good faith and approved by the department when the following conditions exist:
- (i) the stock of distilled spirits sought to be closed out has

been in this State, either in the possession of the vendor who sold it to the retailer or in the possession of the retailer who seeks to close out the brand, for a period of not less than six months; (ii) the stock of distilled spirits to be closed out was not brought into this State for the purpose of offering it, or any part of it, at a closeout sale; (iii) at least 10 days prior to filing a request with the department for approval to sell the stock at a closeout sale, the retailer had offered to return the distilled spirits, at his original invoice cost, to both the vendors from whom he purchased them or to his successor and to the licensee who filed the minimum price schedule under the provisions of this section; (iv) such offer of return was not accepted.

At the place of any closeout sale and upon any package of distilled spirits to be so sold and in any advertisement in connection therewith, public notice shall be given of the sale as a closeout sale. Following the conclusion of a closeout sale, the retailer who conducted such sale shall not sell the same brands of distilled spirits for a period of at least one year.

(2) Sales made with the approval of the department when the distilled spirits or the package is damaged or deteriorated in quality and notice of this fact is given to the public at the place of any such sale and upon the package offered for sale and in any advertisement in connection therewith.

(3) Sales made by any officer acting under the orders of any court.

(4) Sales of distilled spirits for use in the manufacture or production of food products which are unfit for beverage use as provided in Section 23112, if such distilled spirits are sold to a person who holds a permit and identification number authorizing the filing of a claim for drawback of federal distilled spirits excise taxes under the Federal Non-Beverage Drawback Regulations.

(i) A minimum retail price schedule containing a minimum retail price for each package of any brand of beer may be filed under the provisions of this chapter by the person in control of such brand and when so filed, the provisions of this chapter and any rules adopted by the department for the administration of the provisions of this chapter shall apply to the sale of packages of such brand of beer.

(j) The department shall adopt rules whereunder minimum retail prices of distilled spirits will be made available to licensees; means of making such prices available may include, but need not be limited to, publication in trade journals or industry price books of general circulation among retail licensees in this state, or in parts or trading areas of this state.

**California Business and Professions Code Section 24862**

§ 24862.

No licensee shall in this state sell or resell to a retailer, and no retailer shall in this state buy any item of wine except at the selling or resale price thereof contained either in an effective price schedule or in an effective fair trade contract as authorized by Chapter 10 of this division, unless otherwise provided in this chapter.

No licensee in this state shall sell or resell to a consumer any item of wine at less than the selling or resale price thereof contained either in an effective price schedule or in an effective fair trade contract as authorized by Chapter 10 (commencing with Section 24749) of this division unless otherwise provided in this chapter.

Wine sold pursuant to a bona fide order accepted on the last business day of any month may be delivered to the purchaser, at the price in effect during said month, within two business days immediately following the last day of the month in which the sale was made.

**California Business and Professions Code Section 24866**

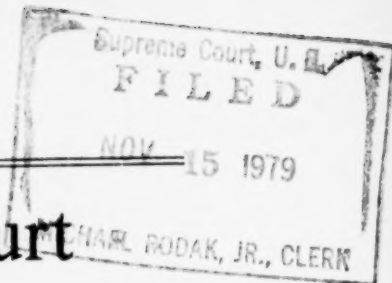
§ 24866.

Each wine grower, wholesaler licensed to sell wine, wine rectifier, and rectifier shall:

(a) Post a schedule of selling prices of wine to retailers or consumers for which his resale price is not governed by a fair trade contract made by the person who owns or controls the brand.

(b) Make and file a fair trade contract and file a schedule of resale prices, if he owns or controls a brand of wine resold to retailers or consumers.





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# In the Supreme Court

OF THE  
United States

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OCTOBER TERM, 1979

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NO. 79-97

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CALIFORNIA RETAIL LIQUOR DEALERS ASSOCIATION,  
a California corporation,  
*Petitioner*

vs.

MIDCAL ALUMINUM, INC., a California corporation,  
*Respondent*

BAXTER RICE as Director of the Department of  
Alcoholic Beverage Control of the State of California  
*Respondent*

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**BRIEF OF VIRGINIA BEER WHOLESALERS ASSOCIATION,  
AMICUS CURIAE, IN SUPPORT OF PETITIONER**

---

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## SUBJECT INDEX

	Page
Interests of Amicus Curiae .....	1
Summary of Argument .....	4
Argument .....	6

### I

THE LEGISLATIVE HISTORY OF THE TWENTY-FIRST AMENDMENT DEMONSTRATES THE FRAMERS' INTENT TO GRANT THE STATES AUTHORITY TO REGULATE THE DELIVERY AND USE OF ALCOHOLIC BEVERAGES WITHIN THEIR BORDERS, UNFETTERED BY TRADITIONAL COMMERCE CLAUSE RESTRICTIONS .....	6
---	---

### II

THE "THROUGH-INTO" METHOD OF TWENTY-FIRST AMENDMENT ANALYSIS EMPLOYED IN THE DECISIONS OF THIS COURT ESTABLISHES THE SUPREMACY OF STATE LAWS, CONTROLLING ALCOHOLIC BEVERAGE TRADE WITHIN STATE BORDERS, OVER THE COMMERCE CLAUSE .....	13
---	----

### III

THIS COURT'S DECISIONS IN CASES INVOLVING FUNDAMENTAL RIGHTS CHALLENGES TO STATE LIQUOR LAWS DO NOT SUPPORT THE RICE BALANCING TEST .....	27
Conclusion .....	29

## TABLE OF CITATIONS

Cases	Page
<i>Adams Express Company v. Kentucky</i> , 238 U.S. 190 (1915) .....	6
<i>Bowman v. Chicago and N.R. Company</i> , 125 U.S. 465 (1888) .....	13
<i>California v. LaRue</i> , 409 U.S. 109 (1972) .....	27, 28
<i>Carter v. Virginia</i> , 321 U.S. 131 (1944) .....	8, 14, 24
<i>Castlewood International Corporation v. Simon</i> , 596 F.2d 639 (5th Cir. 1979) .....	26
<i>Clark Distilling Company v. Western Maryland Rail Company</i> , 242 U.S. 311 (1917) .....	7, 8
<i>Collins v. Yosemite Park Company</i> , 304 U.S. 518 (1938) .....	14, 17, 18, 19
<i>Craig v. Boren</i> , 429 U.S. 190 (1976) .....	8, 24, 27, 28
<i>Department of Revenue v. James B. Beam Distilling Company</i> , 377 U.S. 341 (1964) .....	16
<i>Epstein v. Lordi</i> , 261 F. Supp. 921 (D.C.N.J., 1966) .....	26, 27
<i>Finch and Company v. McKittrick</i> , 305 U.S. 395 (1939) .....	8, 24, 25
<i>Heublein, Inc. v. South Carolina Tax Commission</i> , 409 U.S. 275 (1972) .....	17, 25
<i>Hostetter v. Idlewild Bon Voyage Liquor Corporation</i> , 377 U.S. 324 (1964) .....	passim
<i>In re: Rahrer</i> , 140 U.S. 545 (1891) .....	7
<i>Leisy v. Hardin</i> , 135 U.S. 100 (1890) .....	7, 13

	Page
<i>License Cases</i> , (US) 5 How. 504 (1847) .....	6, 7, 13
<i>National Railroad Passenger Corporation v. Miller</i> , 358 F. Supp. 1321 (D.C. Kan., 1973) affirmed 414 U.S. 948 (1973) .....	26
<i>Rice v. Alcoholic Beverage Control Appeals Board</i> , 21 Cal. 3d 431 (1978) .....	passim
<i>Sail'er Inn, Inc. v. Kirby</i> , 5 Cal. 3d 1 (1971) .....	19, 20
<i>Seagram and Sons v. Hostetter</i> , 384 U.S. 35 (1966) .....	21, 22, 23, 24
<i>State Board of Equalization v. Young's Market Company</i> , 299 U.S. 59 (1936) .....	13, 14
<i>United States v. Frankfort Distilleries</i> , 324 U.S. 293 (1944) .....	15, 23
<i>United States v. State Tax Commission of Mississippi</i> , 412 U.S. 363 (1973) .....	17, 25
<i>Wisconsin v. Constantineau</i> , 400 U.S. 433 (1971) ...	27

### Constitutions

<i>United States Constitution:</i>	
Commerce Clause, Article 1, Section 8 .....	passim
Export-Import Clause, Article 1, Section 10, Clause 2 .....	6, 16
First Amendment .....	28
Fifth Amendment .....	6
Fourteenth Amendment .....	6, 28
Eighteenth Amendment .....	7, 8, 10
Twenty-first Amendment .....	passim



Statutes	Page
Sherman Antitrust Act (15 U.S.C., Section 1) .....	15, 16, 23, 24
Title 4, Alcoholic Beverages and Industrial Alcohol; Chapters 1, 2 and 2.1, Code of Virginia (1950 as amended) .....	1
Webb-Kenyon Act (27 U.S.C. § 122) .....	7, 8
Wilson Act of 1890 (27 U.S.C. § 121) .....	7, 8

Regulations	
Regulations of the Virginia Alcoholic Beverage Control Commission, July 1, 1979 .....	2

Other Authorities	
76 Cong. Rec. 4138 (1933) .....	9
76 Cong. Rec. 4141 (1933) .....	9
76 Cong. Rec. 4143 (1933) .....	10, 12
76 Cong. Rec. 4144-4148 (1933) .....	10, 11
76 Cong. Rec. 4170, 71 (1933) .....	12, 13
76 Cong. Rec. 4177, 78 (1933) .....	12
P. Brest, Processes of Constitutional Decision Making, Cases and Materials, p. 258 (1975) .....	28

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BAXTER RICE as Director of the Department of  
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*Respondent*

## INTERESTS OF AMICUS CURIAE\*

The Virginia Beer Wholesalers Association is an independent voluntary association consisting of ninety-four (94) businesses licensed in Virginia to engage in the wholesale beer business. The Virginia Beer Wholesalers Association represents nearly all of the businesses so licensed. The operations of beer wholesalers in Virginia are governed by a comprehensive scheme of legislation adopted by the General Assembly of Virginia which is set forth in Title 4, Chapters 1, 2 and 2.1 of the Code of Virginia (1950), as amended,

\* Counsel for the parties have consented to the filing of this brief in written communications which have been filed with the Clerk of the Court pursuant to Rule 42(2) of the Rules of this Court.

relating to alcoholic beverage control generally, beverages of not more than three and two-tenths percent (3 2/10%) alcohol and beer franchises, respectively. In addition, the Virginia Alcoholic Beverage Control Commission, pursuant to authority delegated by the legislature in the aforementioned statutes, has enacted a comprehensive set of regulations governing operation of, *inter alia*, licensed Virginia beer wholesalers. See, *Regulations of the Virginia Alcoholic Beverage Control Commission*, July 1, 1979. This comprehensive scheme of state regulation of the malt beverage business in Virginia requires, *inter alia*, that a three-tier system of distribution be maintained involving the strict separation of brewers, wholesalers and retailers; that each tier of the distribution system refrain from acquiring a financial interest in the succeeding tier; that all beer and malt beverages imported into the State from other States for delivery and use therein be channeled through wholesale distributors; that such wholesale distributors be licensed pursuant to the statutes and regulations previously mentioned, that prices at which each brewer and each wholesaler shall sell be posted pursuant to Regulations adopted by the Commission; that certain activities and agreements, express or implied, have the effect of creating beer franchises, and that certain rights and obligations inure to the parties to such franchises, pursuant to relevant statutes.

The entire framework for controlling the manufacture, distribution, sale and possession of alcoholic beverages in the Commonwealth of Virginia was enacted pursuant to the police power of the Commonwealth and its grant of authority under the Twenty-first Amendment. The decision of the California Supreme Court in *Rice v. Alcoholic Bev. etc.*

*Appeals Board*, 21 Cal.3d 431 (1978), relied upon by the court below, raises issues of fundamental importance in determining the scope of the Twenty-first Amendment and its relationship to the commerce clause. The rationale of the *Rice* decision, insofar as the Twenty-first Amendment is concerned, if allowed to stand by this Court, threatens to undermine the legislative and regulatory framework adopted by the Commonwealth of Virginia in the belief that the Twenty-first Amendment has authorized it to take such measures as it sees fit to control alcoholic beverages destined for delivery or use within its borders, free of traditional commerce clause restraints. As a consequence, the interests of the members of the Virginia Beer Wholesalers Association are directly and vitally affected by this case.

While *amicus* has no doubt that the petitioner is capable of seriously and skillfully defending its interests, it is concerned that the petitioner's natural emphasis upon the issues that affect it most immediately may cause it to fail to fully explore the ramifications of the Twenty-first Amendment issue for other concerned parties, such as *amicus*. The *Rice* rationale, if sustained, could readily be applied by other courts in a wide range of contexts and do serious injury to the stability of the statutory framework for the control of alcoholic beverages not only in the Commonwealth of Virginia, but, indeed, throughout the country. The interest of *amicus* is limited, however, to the Twenty-first Amendment issue certified by this Court in its order granting the petition for writ of certiorari.

### SUMMARY OF ARGUMENT

The legislative history of the Twenty-first Amendment, its express language and the Supreme Court decisions construing the Amendment make it clear that this provision of the Constitution was intended to grant to the states authority to control the distribution and use of alcoholic beverages within state borders unfettered by the traditional constraints of the commerce clause. The intent of the framers of the Twenty-first Amendment was to remove the commerce clause as a barrier to the enforcement of state laws designed to prohibit, regulate or control the delivery or use of alcoholic beverages within state borders. No decision of this Court has held to the contrary. In every case in which this Court has been confronted with a commerce clause-based challenge to a state law aimed at the control of alcoholic beverages delivered or used within a state, the challenge has been rejected. In no case was the result a product of a Twenty-first Amendment versus commerce clause "balancing test;" rather, in each case, the results flowed from a determination that the commerce clause was simply inapplicable.

The California Supreme Court's decision in *Rice* now threatens to rewrite this well established line of judicial construction of the scope of the Twenty-first Amendment. Indeed, the *Rice* rationale threatens to demote the Twenty-first Amendment to the level of a mere factor, to be considered together with commerce clause-derived factors, even in cases which fall within the express terms of the Amendment. The result in *Rice* stems from a misreading of several lines of decisions of this Court determining that the state law in question (a) operated to prohibit or unduly

burden the flow of alcoholic beverages *through* the state and thus was not intended to be shielded from the operation and effect of the commerce clause or (b) impinged upon some provision of the Constitution other than the commerce clause, as to which the Twenty-first Amendment was never intended to have a limiting effect.

The cause of the erroneous Twenty-first Amendment result in the *Rice* decision is the California Supreme Court's misreading of *Hostetter v. Idlewild Bon Voyage Liquor Corporation*, 377 U.S. 324 (1964). A correct reading of *Hostetter* establishes it as a so-called "through" case in which this Court held, after weighing an unusual factual situation, that the case did not fall within the scope of the Twenty-first Amendment because the liquor in question was not destined for delivery and use within the State of New York. *Rice* mistakenly construes *Hostetter* as a case in which this Court found both the Twenty-first Amendment and the commerce clause to be applicable and, as a matter of law, that the commerce clause outweighed the Twenty-first Amendment. A careful reading of *Hostetter*, however, demonstrates that this Court determined, upon the exceptional facts presented, that the authority sought to be exercised was not granted to the states by the Twenty-first Amendment. Having found on the facts that the case fell outside the scope of the Amendment, this Court then applied traditional commerce clause restraints.

Finally, the significance attached by the *Rice* Court and respondents herein to the line of decisions involving federal Constitutional challenges to state alcoholic beverage statutes on non-commerce clause grounds is misplaced. It is clear that the framers of the Amendment intended only to



deflect the normal operation of the commerce clause. There is no evidence that the framers of the Amendment intended it to limit the operation of any provision of the Constitution other than the commerce clause. It is difficult to understand why the decisions of this Court involving Fifth Amendment, Fourteenth Amendment and Export-Import Clause challenges to state liquor statutes should be thought to have significance for commerce clause-based attacks on such laws.

It is well settled that the Twenty-first Amendment operates in conjunction with all other provisions of the United States Constitution, excluding the commerce clause. Accordingly, this Court has found that the Amendment does not save even a state law within its scope from the reach of these other provisions of the Constitution.

# I

## ARGUMENT

### THE LEGISLATIVE HISTORY OF THE TWENTY-FIRST AMENDMENT DEMONSTRATES THE FRAMERS' INTENT TO GRANT THE STATES AUTHORITY TO REGULATE THE DELIVERY AND USE OF ALCOHOLIC BEVERAGES WITHIN THEIR BORDERS, UNFETTERED BY TRADITIONAL COMMERCE CLAUSE RESTRICTIONS

Prior to the enactment of the Twenty-first Amendment, the federal government had plenary power under the commerce clause of the United States Constitution,<sup>1</sup> with respect to foreign and interstate traffic in alcoholic beverages. *Adams Exp. Co. v. Kentucky*, 238 U.S. 190 (1915); *License Cases (US)* 5 How. 504, 585, 607 (1847).

<sup>1</sup> U.S. Constitution, Article 1, Section 8: "The Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian Tribes."

The history of state regulation of alcoholic beverages dates long before adoption of the Eighteenth Amendment. In the *License Cases*, *supra*, 504, the Court recognized a broad authority in the states to regulate the alcoholic beverage trade within their borders free from implied restrictions under the commerce clause. Later in the century, however, *Leisy v. Hardin*, 135 U.S. 100 (1890), undercut the *License Cases*. This lead Congress, acting pursuant to its powers under the commerce clause, to reactivate the state's regulatory rule through the passage of the Wilson<sup>2</sup> and Webb-Kenyon<sup>3</sup> Acts. *See, e.g., Clark Distilling Co. v. Western Maryland R. Co.*, 242 U.S. 311 (1917) (upholding Webb-Kenyon Act); *In re: Rahrer*, 140 U.S. 545 (1891) (upholding Wilson Act).

The Webb-Kenyon Act, enacted in 1913 and reenacted in 1935, took away the protection of interstate commerce from all receipt and possession of liquor prohibited by state law. That the commerce clause of the Constitution prevents the enforcement of prohibitions prescribed by state laws was denied in the case of *Clark Distilling Co.*, *supra*, wherein the Court upheld the constitutionality of the Webb-Kenyon Act after observing:

<sup>2</sup> The Wilson Act, enacted in 1890, reads in pertinent part: "... intoxicating liquors or liquids transported into any State or Territory... shall upon arrival in such State or Territory be subject to the operation and effect of the law in such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as those such liquids or liquors had been produced in such State or Territory. . . ." 27 U.S.C.A. § 121.

<sup>3</sup> The Webb-Kenyon Act of 1913 prohibits "[t]he shipment or transportation . . . of any . . . intoxicating liquor of any kind, from one State, Territory or District . . . into any other State, Territory, or District . . . [for the purpose of being] received, possessed, sold, or in any manner used . . . in violation of any law of such State, Territory, or District. . . ." 27 U.S.C.A. § 122.

The movement of liquor in interstate commerce and the receipt and possession and right to sell prohibited by the state law having been in express terms divested by the Webb-Kenyon Act of their interstate commerce character, it follows that if that act was within the power of Congress to adopt, there is no possible reason for holding that to enforce the prohibitions of the state law would conflict with the commerce clause of the Constitution . . . 242 U.S. at 325.

The Twenty-first Amendment repealed the Eighteenth Amendment in 1933. The wording of Section 2 of the Amendment closely follows the Webb-Kenyon Act and the Wilson Act, thereby "expressing the framers' clear intention of constitutionalizing the Commerce Clause framework established under those statutes." *Craig v. Boren*, 429 U.S. 190, 206 (1976). This Court's decisions since have confirmed that the Amendment primarily created an exception to the normal operation of the commerce clause. *See, e.g., Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 330 (1964); *Carter v. Virginia*, 321 U.S. 131, 139-140 (1944) (Frankfurter, J., concurring); *Finch & Co. v. McKittrick*, 305 U.S. 395, 398 (1939).

In addition to the Amendment's embrace of the policy of Webb-Kenyon, the Senate debates illustrate that state law supremacy in dealing with internal alcoholic beverage trade was the objective of the framers. As reported by the Senate Committee on the Judiciary in S. J. Res. 211, 72d Cong., 2d Sess. (1933), the proposed Amendment provided in section 2, "the transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors in violation

of the laws thereof is hereby prohibited." 76 Cong. Rec. 4138 (1933). That language is in the Amendment as adopted.

But the proposal also contained a section 3, not found in the present Amendment. That section provided, "Congress shall have *concurrent* power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold." *Ibid.* (Emphasis added). Proposing to leave even this remnant of federal control over liquor traffic gave rise to the only real controversy over the language of the proposed Amendment. *See, Hostetter v. Idlewild Liquor Corp., supra*, at 337.

Senator Blaine, referring to the Republican<sup>4</sup> and Democratic Party<sup>5</sup> platform provisions dealing with proposed section three of the Amendment, said "They both proposed to prevent the return of the saloon . . . the Republican platform proposes to do it by leaving in Congress some power . . . because after the eighteenth amendment is repealed the Congress will have no police powers . . . the Republican platform proposes to repose the power not only in the states but also in the Congress. . . ." *supra* at 4141.

<sup>4</sup> "We, therefore, believe that the people should have an opportunity to pass upon a proposed Amendment the provision of which, while retaining in the Federal Government power to preserve the gains already made in dealing with the evils inherent in the liquor traffic, shall allow States to deal with the problem as their citizens may determine, but subject always to the power of the Federal Government to protect those States where prohibition may exist and safeguard our citizens everywhere from the return of the saloon and attendant abuses." 76 Cong. Rec. 4141 (1933).

<sup>5</sup> "We urge the enactment of such measures by the several States as will actually promote temperance, effectively prevent the return of the saloon, and bring the liquor traffic into the open under complete supervision and control by the States." 76 Cong. Rec. 4141 (1933).



Senator Walsh of Massachusetts, in commenting upon the difference between the two party platforms, stated: "Is not the difference in the two party platforms in substance this, That the Democratic Party platform declares for the States and the States alone determining the manner in which intoxicating liquors shall be manufactured, sold, and distributed, while the Republican Party platform holds to control over the method of sale in part by the Federal Government and in part by the State governments?" *Id.* at 4142.

In commenting upon his views regarding the need to delete section 3 from the proposed Twenty-first Amendment, Senator Blaine stated: "Mr. President, my own personal viewpoint upon section 3 is that it is contrary to section 2 of the Resolution. . . . The purpose of section 2 is to restore to the States by constitutional amendment absolute control in effect over interstate commerce affecting intoxicating liquors which enter the confines of the state. The state under section 2 may enact certain laws on intoxicating liquors, and section 2 at once gives such laws effect. . . . [U]nder section 3, the proposal is to take away from the states the powers that the states would have in the absence of the eighteenth amendment. . . . [S]ection 3 is inconsistent with section 2 and the two sections are incompatible and that section 3 ought to be taken out of the Resolution. . . ." *Id.* at 4143.

Senator Wagner of New York opposes section 3 because it would defeat the proposed Amendment's purpose "to restore to the States control of their liquor problem." *Id.* at 4145.

Senator Wagner made these comments in opposition to section 3: "The real cause of the failure of the eighteenth

amendment was that it attempted to impose a single standard of conduct upon all the people of the United States without regard to local sentiment . . . Section 3 of the pending joint resolution proposes to condemn the new amendment to a similar fate of failure. . . . [N]o law can live unless it finds its lodgment in the public conscience. . . . [S]ection 3 does not in itself impose a national standard but it invites Congress to impose it. . . ." *Id.* at 4146.

Senator Wagner then continued to discuss the legal effects of section 3: "As for the saloon—let us face the fact that it is beyond the realm of proper Federal action. The duty of preventing its restoration rests upon the State. . . . consequently, I am fully satisfied that if we permit our Government to function as it was intended to function, through the States, we shall find that the people of each of the 48 States will adopt those methods which will. . . . bring the liquor traffic under control and actually promote temperance. . . . Federal guarantees are futile. At the bedrock of this entire question lies this immovable truth: That there is nothing the Constitution can say, nothing the Federal Government can do, which will successfully impose a rule of conduct upon a community except by the will of the people of that community." The Senator then succinctly states the issue: "The problem confronting us, Mr. President, is to choose between two alternative courses. Either the control of the local liquor traffic is to remain in the Federal Government or is it to be restored to the States." *Id.* at 4147-4148.

*Amicus* submits that it is clear that this opposition to section 3 resulted from the fear voiced during the Senate debate that any grant of power to the Federal Government



could be used to whittle away the exclusive control over liquor traffic given the states by section 2.

Senator Robinson of Arkansas, the Senate Majority Leader, in response to the Senators' fear regarding the grant of power to the Federal Government, asked for a vote "to strike out section 3." *Id.* at 4171. The Senate then voted to delete section 3 from the proposed Amendment while retaining section 2 with its broad grant of power to the states. *Id.* at 4179.

During the debate on the motion to strike section 3, the Senators brought out clearly that section 2, as it now appears in the Twenty-first Amendment, was intended to give the states the broadest possible power in dealing with internal alcoholic affairs. Senator Blaine of Wisconsin, Chairman of the Subcommittee which had held hearings on the Resolution and Floor Manager of the Resolution in the Senate, agreed that section 3 "ought to be taken out of the Resolution" and section 2 left in, because the "purpose of section 2 is to restore to the States by constitutional amendment absolute control in effect over interstate commerce affecting intoxicating liquors which enter the confines of the State." *Id.* at 4143.

This legislative history, *amicus* submits, indicates that when the Senators agreed to section 2 [thereby deleting section 3] they thought they were returning "absolute control" of liquor traffic to the states, free of all restrictions which the commerce clause might before that time have imposed. Moreover, by rejecting section 3, *amicus* suggests the Senators thought that the federal government would be prevented from interfering with the state's exercise of the power conferred by the Amendment.

Senator Borah of Idaho perhaps expressed the concerns of the Senators most completely when he traced the history of state regulation of liquor traffic from Justice Taney's decision in the *License Cases*, 5 How. 504 (1847), which upheld state power over liquor, through *Bowman v. Chicago and N. R. Co.*, 125 U.S. 465 (1888), which Senator Borah said "wiped out the Taney decision," to *Leisy v. Hardin*, 135 U.S. 100 (1890) which made the states "powerless to protect themselves against the importation of liquor into the States." 76 Cong. Rec. 4170-4171 (1933). It was because of this judicial history that Senator Borah intended, by expressing his uneasiness at leaving anything less than a Constitutional Amendment "to the protection of the Supreme Court of the United States," to guarantee that the states would not be rendered powerless over liquor traffic. *Ibid.*; *Hostetter, supra*, at 340. Despite the framers' clear intent to the contrary, the balancing test employed by the *Rice* decision interprets the Twenty-first Amendment to have reserved in the federal government basic commerce clause authority over alcoholic beverages delivered or used within state borders. *Amicus* submits that the legislative history of the Twenty-first Amendment mandates a contrary result.

## II

### THE "THROUGH-INTO" METHOD OF TWENTY-FIRST AMENDMENT ANALYSIS EMPLOYED IN THE DECISIONS OF THIS COURT ESTABLISHES THE SUPREMACY OF STATE LAWS, CONTROLLING ALCOHOLIC BEVERAGE TRADE WITHIN STATE BORDERS, OVER THE COMMERCE CLAUSE

In *State Board v. Young's Market Co.*, 299 U.S. 59 (1936), this Court rejected a commerce clause and equal

protection challenge to a California statute imposing a five hundred dollar license fee for the privilege of importing beer from another state for delivery or use therein. The Court determined that the Twenty-first Amendment had authorized California to impose a restriction which, prior to the adoption of the amendment, would unquestionably have constituted an unlawful burden upon interstate commerce. *Young* began a consistent line of so-called "into" cases in which the Court has invariably sustained state laws regulating the transportation of alcoholic beverages into states for delivery or use therein against commerce clause-based challenges. The *Young* decision also established that the Amendment was intended to confer upon the States not merely the power to prohibit the importation of alcoholic beverages but to adopt lesser degrees of control and regulation as they see fit. The Court observed that the words of the Amendment are so clear as to "confer upon the State the power to forbid all importations which do not comply with the conditions which it prescribes." 299 U.S. at 62.

The decision in *Collins v. Yosemite Park Company*, 304 U.S. 518 (1938), clearly develops the distinction between the "into" cases and the "through" cases. In *Collins*, the Court determined that shipments of liquor through the State of California destined for delivery and use in a national park did not constitute transportation or importation into California "for delivery or use therein" within the meaning of the Twenty-first Amendment since the national park was under a distinct sovereignty apart from the State of California. 304 U.S. at 538. The "through-into" dichotomy was also adopted in *Carter v. Virginia*, 321 U.S. 131

(1944), although in that case the mode of regulation chosen by Virginia as a means of preventing the unlawful diversion into intrastate commerce of a "through" shipment was upheld as reasonable.

The Supreme Court further developed the rationale of the "into" cases in *U.S. v. Frankfort Distilleries*, 324 U.S. 293 (1944), wherein it determined that the Twenty-first Amendment did not operate to shield purely private conduct from the applicability of the commerce clause in cases where the state has failed to exercise the authority conferred upon it by the Amendment. The *Frankfort Distilleries* case involved a Sherman Act prosecution of a private combination among liquor producers, wholesalers and retailers to coerce competitors into signing "Fair Trade" contracts for liquor commodities. The *Frankfort Distilleries* Court considered the argument that the Twenty-first Amendment shielded the defendants from prosecution under the Sherman Act, but observed that the Sherman Act was not being enforced in a manner that conflicted with the law of the state. The decision thus demonstrates that State supremacy over the commerce clause exists only when the State has undertaken to regulate in an area to which the commerce clause would otherwise apply. Justice Frankfurter, in a concurring opinion frequently cited in subsequent cases, observed:

As a matter of constitutional law, the result of the Twenty-first Amendment is that a State may erect any barrier it pleases to the entry of intoxicating liquors. Its barrier may be low, high or insurmountable. Of course, if a State chooses not to exercise the power given it by the Twenty-first Amendment and to con-

tinue to treat intoxicating liquors like other articles, the operation of the Commerce Clause continues. Since the Commerce Clause is subordinate to the exercise of state power under the Twenty-first Amendment, the Sherman Law, deriving its authority from the Commerce Clause, can have no greater potency than the Commerce Clause itself. It must equally yield to state power drawn from the Twenty-first Amendment. 324 U.S. at 300-301.

The decision in *Department of Revenue v. James B. Beam Distilling Company*, 377 U.S. 341 (1964), further illustrates the Court's adherence to the "through-into" dichotomy. In *Beam*, the Court determined that a Kentucky tax on foreign imports which, when delivered to a bonded warehouse in Kentucky retained their character as imports, was unconstitutional under the Export-Import Clause.<sup>6</sup> The Court appeared to presume that the liquor was destined to be sent through the state for ultimate delivery in other states. It pointed out that, were the liquor destined for distribution, use or consumption within the state, then

... under the Twenty-first Amendment Kentucky could not only regulate, but could completely prohibit the importation of some, or of all [such] intoxicants. 377 U.S. at 346.

<sup>6</sup> U.S. Const., Art. I, § 10, cl. 2. "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress."

*See, Heublein, Inc. v. South Carolina Tax Commission*, 409 U.S. 275, 283 (1972) and *United States v. State Tax Commission of Mississippi*, 412 U.S. 363, 375 (1973).

Against this background of the line of Supreme Court decisions adhering to the "through-into" dichotomy for determining whether to apply the Twenty-first Amendment or the commerce clause, the *Rice* decision seizes upon *Hostetter* as signifying an embrace of "constitutional balancing" as a new tool for Twenty-first Amendment analysis.

In light of the significance attached to *Hostetter* by the *Rice* decision, *Hostetter* bears extended analysis. In *Hostetter* an unlicensed New York liquor retailer was engaged in the sale of liquor to passengers at Kennedy Airport departing for foreign destinations. The liquor was not delivered to the customers in New York, but rather was transported to the awaiting planes and delivered to the consumers upon their arrival at their foreign destinations. The liquor was at all times during its movement into New York and to the awaiting aircraft subject to the control of the U.S. Bureau of Customs. In deciding the case, the Court attached major significance to *Collins, supra*, a "through" case. Writing for the majority, Justice Stewart observed:

Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case.

This principle is reflected in the Court's decision in *Collins v. Yosemite Park Company*, 304 U.S. 518. There it was held that the Twenty-first Amendment did not give California power to prevent the shipment into



and through her territory of liquor destined for distribution and consumption in a national park. The Court said that this traffic did not involve "transportation into California 'for delivery or use therein' " within the meaning of the Amendment. "The delivery and use is in the Park, and under a distinct sovereignty."

A *like* accommodation of the Twenty-first Amendment with the Commerce Clause leads to a *like* conclusion in the present case. Here, ultimate delivery and use is not in New York but in a foreign country. The State has not sought to regulate or control the passage of intoxicants through her territory in the interest of preventing unlawful diversion into the internal commerce of the State. [Emphasis added]. 377 U.S. at 332-333.

The "accommodation" made by the *Hostetter* decision rested upon the Court's determination that the unusual facts with which it was presented more closely touched interests intended to be furthered by the commerce clause than those addressed by the Twenty-first Amendment. *Hostetter* therefore must be viewed as a "through" case.

The rationale implicit in *Rice* that a *Hostetter* "accommodation test" supports a conclusion that the Twenty-first Amendment may be outweighed by the commerce clause "even in those situations covered by the express language of the Amendment," 21 Cal.3d at 449, is demonstrably incorrect. This Court's reference to "a like accommodation" to describe the basis for the *Hostetter* result was a clear reference to the rationale employed in *Collins, supra*. *Collins* analyzed the facts in order to determine whether the case presented issues arising within the scope of the Twenty-first Amendment or within the scope of the com-

merce clause. Nowhere in *Hostetter* or *Collins*, or any other "through" case which this Court has decided, is there any suggestion that the commerce clause might outweigh the Twenty-first Amendment in cases to which they both apply.

The *Rice* court begins its discussion of the Twenty-first Amendment issue with the accurate observation that "it is settled that States do not have plenary powers over all matters relating to alcoholic beverages," 21 Cal. 3d at 448. The Court then proceeds to the conclusion that *Hostetter* supports the proposition that "when a statute enacted pursuant to the Twenty-first Amendment conflicts with an enactment based on the commerce clause, we must *balance the policies* furthered by each in order to determine which should prevail." *Id.* (Emphasis added). The *Hostetter* decision does not support *Rice's* use of a policy balancing test. Rather, in *Hostetter* the Court considered the juxtaposition of policies furthered by the Twenty-first Amendment and the commerce clause in order to determine, upon the facts of the case at bar, whether the interests sought to be protected were those within the purview of the Amendment or whether they more properly came within the realm of the commerce clause.<sup>7</sup>

The California Supreme Court's policy balancing view of *Hostetter* stems from its decision in *Sail'er Inn., Inc. v. Kirby*, 5 Cal. 3d 1 (1971). In *Sail'er Inn*, the California Court adopted a novel balancing approach to reach the conclusion that the Twenty-first Amendment can be subordinated to the commerce clause "even in those situations

<sup>7</sup> See, Note, *The Evolving Scope of State Power Under The Twenty-first Amendment*, 19 Rutgers L. Rev. 759, 772-73 (1965).

covered by the express language of the Amendment," *Id.*, at 12, a conclusion of Orwellian proportions in light of the clear intent of the framers of the Twenty-first Amendment to constitutionalize its supremacy over the commerce clause in cases involving the validity of state laws aimed at controlling alcoholic beverages delivered or used within their borders.

Having thus misread *Hostetter*, and relying upon its evisceration of the very purpose of the Twenty-first Amendment in *Sail'er Inn*, *Rice* proceeded to the employment of the "balancing test," an "explicit adoption" of which it divined in *Hostetter*. 21 Cal.3d at 449. *Rice* sidestepped this Court's clear pronouncements in decisions subsequent to *Hostetter* demonstrating that this Court had merely weighed diverse constitutional interests as an aid to the "through-into" method of analysis upon the facts of each case.

*Rice* then compounded its misreading of *Hostetter* by failing even to balance competing constitutional considerations. Rather, it applied an ordinary "commerce clause versus legitimate local interest" balancing approach. *Rice* considered the effectiveness of the California resale price maintenance statutes in accomplishing their intended purpose; the impact of those statutes upon competition; the impact of "public policy;" and whether California might have selected a less restrictive alternative to the resale price maintenance statute in question. *Id.* at 454-458. Nowhere in this "balancing test" is there a reference to the Twenty-first Amendment; to the "wide latitude" commanded by the Twenty-first Amendment in reviewing state alcoholic beverage statutes; or to the "added weight" in favor of the

validity of state alcoholic beverage statutes conferred by the Twenty-first Amendment. Having paid lip service to the decisions of this Court confirming that traditional commerce clause restraints are not applicable to state alcoholic beverage statutes falling within the scope of the Twenty-first Amendment, the Court nevertheless proceeded to apply traditional commerce clause restraints in the *Rice* case. In fact, it is implicit in the *Rice* decision that the Sherman Act enjoys supremacy over the Twenty-first Amendment, a proposition which, it hardly need be said, is preposterous.

The decisions of this court subsequent to *Hostetter* demonstrate beyond all reasonable doubt that *Hostetter* did not inaugurate a new approach to resolving Twenty-first Amendment conflicts with the commerce clause. Of particular significance is *Seagram & Sons v. Hostetter*, 384 U.S. 45 (1966). In *Seagram*, a New York statute requiring nationwide price affirmation by liquor wholesalers was attacked for, among other reasons, its alleged burden upon interstate commerce. The Court described the case as involving an attempt to control the flow of liquor destined for use within a state and observed that, *because of that fact*, "the Twenty-first Amendment demands wide latitude for regulation by the state." The Court did not engage in a "balancing" of the competing policies underlying the Twenty-first Amendment and the commerce clause in its evaluation of the validity of the statute in question. Indeed, it expressly declined *Seagram's* invitation to do so. The Court observed:

We need not now decide whether the mode of liquor regulation chosen by a State in such circumstances could ever constitute so grave an interference with a



company's operation *elsewhere* as to make the regulation invalid under the Commerce Clause [Citations]. No such situation is presented in this case. [Emphasis added]. 384 U.S. at 42-43.

Having thus asserted its view that the case presented no confrontation between the Twenty-first Amendment and the commerce clause, the court proceeded to consider the effect of the statute in terms of the alleged burden upon the operations of the company in other states. Assuming, *arguendo*, that the *Seagram* Court considered a Twenty-first Amendment versus commerce clause issue, it is clear that it did so only because of the "reach" of the statute beyond the borders of the state and not because of any aspect of its operation within New York State.

The significant message in *Seagram* lies in its citation of *Hostetter* as support for the traditional view that "a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders." *supra*, at 42. Further, the *Seagram* opinion explained the result in *Hostetter*, not in terms of a constitutional balancing test as the *Rice* decision contends, but rather because of the simple fact that, in *Hostetter*:

"the ultimate delivery and use of the liquor was in a foreign country, and the Court held that under those circumstances New York could not forbid sales made under the explicit supervision of the United States Customs Bureau, pursuant to laws enacted by Congress under the Commerce Clause for the regulations of commerce with foreign nations. [Citations] Unlike [Hostetter], the present case concerns liquor destined

for use, distribution or consumption in the State of New York. In that situation, the Twenty-first Amendment demands wide latitude for regulation by the state." *Id.*, at 42.

The *Rice* court chose to interpret the language in *Seagram* just quoted as follows:

"While the court did make a distinction between the case there under consideration and *Hostetter* on the ground that the latter involved regulation of liquor for use outside the state, whereas the rule considered in *Seagram & Sons* related to liquor to be consumed within the regulating state, the distinction was made for the purpose of determining whether the regulation placed an unconstitutional burden on interstate commerce." *Id.*, at 449.

*Seagram* did not make this distinction for the purpose *Rice* suggests. The *Seagram* court drew the distinction on the facts for the purpose of identifying *Hostetter* as a "through" case. *Rice's* confusion over the *Seagram* decision is further highlighted by its discussion of the Sherman Act argument advanced on behalf of the plaintiffs. Nothing could be clearer from *Seagram* than the fact that the Court was discussing the potential application of the Sherman Act to private conduct not mandated, compelled or sanctioned by state law. Its citation to the *Frankfort Distilleries* decision makes that proposition self-evident. Yet, the *Rice* court suggests that the discussion of the potential application of the Sherman Act in *Seagram* illustrates this Court's support for the view that if

... state regulation of liquor to be used within the state is immune from attack because the Twenty-first Amendment affords states plenary powers over liquor con-



sumed within their borders, free of the restrictions imposed by the Sherman Act, there would have been no necessity for the court (in *Seagram*) to discuss the merits of the antitrust claims. *Id.*, at 450.

Thus, the *Rice* decision attempts to bootstrap from *Seagram's* discussion of the application of the Sherman Act to private conduct, outside the scope of state regulation, to the conclusion that the Sherman Act can be applied so as to conflict with and override a state regulation. Despite the effort in *Rice* to obfuscate the decision in *Seagram*, that decision nevertheless stands as a straightforward application of the "into" method of analysis for determining the primacy of Twenty-first Amendment-based state laws over the commerce clause.

This view of the Amendment, as well as the above-stated construction of *Hostetter*, was strengthened and confirmed by the decision in *Craig v. Boren*, 429 U.S. 190 (1976). In *Boren*, the Court invalidated an Oklahoma statute containing an invidious gender-based discrimination as a denial of equal protection of the laws. Nevertheless, in discussing the scope of the Twenty-first Amendment, the Court reiterated its often-voiced view of the relationship between that Amendment and the commerce clause. Justice Brennan, writing for the majority, observed:

This Court's decisions since [the passage of the Amendment] have confirmed that the Amendment primarily created an exception to the normal operation of the Commerce Clause. See, e.g. *Hostetter v. Idlewild Bon Voyage Liquor Corporation*, 377 U.S. 324, 330 (1964); *Carter v. Virginia*, 321 U.S. 131, 139-140 (1944) (Frankfurter J., concurring); *Finch & Com-*

*pany v. McKittrick*, 305 U.S. 395, 398 (1939). *Id.*, at 206.

The view of *Hostetter* as a decision well within the traditional Twenty-first Amendment standards enunciated by this Court since the adoption of that provision is illustrated in *Heublein, Inc. v. South Carolina Tax Commission*, *supra*. In *Heublein*, the Court considered a commerce clause-based challenge to the operation of a South Carolina liquor statute that operated, in the view of the plaintiff, so as to force it to engage in activities in the state which subjected it to the South Carolina taxing power. This Court upheld the requirement even as an exercise of the state's police power and further observed:

Nor does this requirement violate the Commerce Clause. The Twenty-first Amendment, § 2, provides that "[t]he transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited. As this court said in *Hostetter v. Idlewild Bon Voyage Corp.*, 377 U.S. 324, 330 (1964):

This court made clear in the early years following the adoption of the Twenty-first Amendment that by virtue of its provisions a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders. *Id.*, at 283.

Likewise, in *State Tax Commission of Mississippi*, *supra*, the Court cites *Hostetter* as support for the view that the Twenty-first Amendment was intended to free the states of traditional commerce clause limitations and, further,

brackets *Hostetter* with its predecessors in the establishment of the "through-into" dichotomy for Twenty-first Amendment analysis. *Id.*, at 377-378.

Thoughtful lower court decisions reaching the conclusion that the Twenty-first Amendment operates, in cases within its scope, so as to override the commerce clause are *Castlewood International Corporation v. Simon*, 596 F.2d 639 (5th Cir., 1979), *Epstein v. Lordi*, 261 F.Supp. 921 (D.C.N.J., 1966) and *National Railroad Passenger Corporation v. Miller*, 358 F.Supp. 1321 (D.C.Kan., 1973), *affirmed*, 414 U.S. 948 (1973). The *National Railroad* decision is particularly important in light of the decision of this Court to summarily affirm. The *Rice* decision brushed aside *National Railroad* in a footnote (and pointedly ignored this Court's decision to affirm). *Id.*, at 450. Nevertheless, the *National Railroad* decision is important because of the clarity with which it sets forth the Court's view in *Seagram* so as to demolish any notion of a major change in Twenty-first Amendment analysis stemming from *Hostetter*. *Id.*, at 1327.

The *Epstein* decision is helpful because it succinctly states the view of *Hostetter* which *amicus* has urged upon this Court herein. In *Epstein*, the District Court reviewed the language in *Hostetter* which *Rice* reads as establishing a new constitutional balancing test for Twenty-first Amendment analysis and then observed:

New Jersey interprets this to mean that the State's power under the Twenty-first Amendment may be somewhat diminished when the interests protected by the Commerce Clause are sufficiently strong. Brief for the Defendant, page 22.

On the contrary, we read *Hostetter* as requiring a case by case consideration of the national interests protected by the Commerce Clause, not merely to measure the extent of State power under the Twenty-first Amendment, but rather to determine whether the Amendment applies at all to the liquor in question; in a word, whether the liquor enters New Jersey 'for delivery or use therein.' *Id.*, at 933.

Thus viewed, the court in *Epstein* ranked *Hostetter* as belonging to the family of "through" cases rather than signifying the fundamental shift in Twenty-first Amendment analysis which the *Rice* opinion suggests.

### III

#### THIS COURT'S DECISIONS IN CASES INVOLVING FUNDAMENTAL RIGHTS CHALLENGES TO STATE LIQUOR LAWS DO NOT SUPPORT THE RICE BALANCING TEST

Other than *Hostetter* and *Seagram*, the cases principally relied upon by the California Supreme Court in *Rice* in articulating the need to consider the commerce clause and the Twenty-first Amendment in juxtaposition to determine which should prevail are *Wisconsin v. Constantineau*, 400 U.S. 433, (1971); *Craig v. Boren, supra*; and *California v. Larue*, 409 U.S. 109 (1972). None of these cases involve a confrontation between the Twenty-first Amendment and the commerce clause. In every instance, they involve a confrontation between the Twenty-first Amendment and other provisions of the United States Constitution relating to the fundamental rights of individuals.

The relationship between the Twenty-first Amendment and provisions of the United States Constitution other than

the commerce clause is irrelevant to the Twenty-first Amendment issue in the instant case. As one commentator has remarked: "Neither the text nor the history of the Twenty-first Amendment suggests that it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale or use of liquor is concerned." *P. Brest, Processes of Constitutional Decisionmaking, Cases and Materials*, 258 (1975); *Craig v. Boren*, *supra*, at 206.

An example of the *Rice* Court's misinterpretation of the above-cited cases is revealed in its discussion of *Craig v. Boren*, *supra*. At page 451, the *Rice* Court observes:

The most recent discussion of the Twenty-first Amendment reaffirms that the amendment does not except all state laws involving liquor from every commerce clause enactment. In *Craig v. Boren* (1976) 429 U.S. 190, 97 S. Ct. 451, 50 L. Ed.2d 397, an Oklahoma statute specifying different drinking ages for men and women was declared unconstitutional under the equal protection clause.

Thus, the *Rice* decision cites *Craig v. Boren* for the proposition that state liquor laws may be subordinate to the commerce clause and yet immediately recognizes *Craig v. Boren* as an equal protection case. This inconsistency is not explained.

Likewise, the *Rice* Court felt that *California v. Larue*, *supra*, "did not, however, cast doubt on the need to accommodate and balance." *Id.* at 451. And yet, *California v. Larue* involved the relationship between the Twenty-first Amendment and the First Amendment. The case did not deal with the commerce clause and *Rice's* reliance upon it in support of its balancing test is misplaced. The fact that

the Court has been called upon to weigh the competing constitutional interests in the cases discussed herein lends no support for the *Rice* view that commerce clause interests should similarly be weighed against the Twenty-first Amendment since the Amendment was intended to take precedence over that provision in cases falling within its scope.

### CONCLUSION

The decision of the Court below should be reversed for the reasons stated herein.

Respectfully submitted,

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### CERTIFICATE OF SERVICE

I, W. Curtis Sewell, attorney for the Virginia Beer Wholesalers Association, and a member of the Bar of the Supreme Court of the United States, hereby certify that three (3) copies of this Brief of *Amicus Curiae* in Support of the petitioner, California Retail Liquor Dealers Association, together with three (3) copies of the Motion for Leave to File a Brief *Amicus Curiae*, have been served upon each of counsel of record for the parties herein, pursuant to Supreme Court Rule 33(1)(3b) by depositing same in the U.S. Post



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